TILL V. SCS CREDIT CORPORATION: A "PRIME-PLUS-PLUS" METHOD *TILL*ING COURTS TO CONSIDER EFFICIENT MARKET EVIDENCE

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TABLE OF CONTENTS

INTRODUCTION 270

I. THE CHAPTER 13 AND CHAPTER 11 CRAM DOWN PROVISIONS 273

II. THE CRAM DOWN METHODS DISCUSSED IN *TILL* 277

- A. *The Factual Background of* Till 277
- B. *The "Coerced Loan" Approach* 279
- C. *The "Presumptive Contract" Approach* 280
- D. *The "Cost of Funds" Method* 281
- E. *The Formula Approach* 282

III. THE POST-*TILL* CIRCUIT SPLIT 285

- A. Till*'s Applicability to Chapter 11 Cases* 285
- B. *The Second Circuit's Gap-Filling and Hybrid Approaches* 288
- C. *The Ninth Circuit: Blended or Formula?* 289
- D. *The Eleventh Circuit: Sometimes Seeking an Efficient Market* 290
- E. *The Fifth Circuit's Factual Inquiry* 291

IV. ANALYSIS: THE "CONTRADICTORY" PORTIONS OF *TILL* THAT RELATE TO CHAPTER 11 292

V. PROPOSAL 295

- A. *Introducing the Prime-Plus-Plus Approach: An Efficient Prime-Plus Rate* 295

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B. *Applying the Prime-Plus-Plus Formula* 297
C. *Counterarguments* 300
VI. WHY NOT THE OTHER CRAM DOWN METHODS? 301
A. *The Efficient Market Approach Does Not Implement the Fundamental Goals of Chapter 11* 301
B. *The Presumptive Contract Approach Does Not Account for the Changed Circumstances of the Parties in Bankruptcy* 303
CONCLUSION 304

INTRODUCTION

Despite impressive economic gains made by American companies following the financial crisis,[1] the first quarter of 2015 saw the highest number of companies filing for bankruptcy since 2010.[2] Some of these bankruptcies were huge; six companies reported at least one billion dollars in assets when they filed in the first quarter of that year, more than the first quarter of any year since 2009.[3] Often, these companies have loans of tens or hundreds of millions of dollars to more than one creditor.[4] A difference of only one percent in the interest rate applied to these loans can have huge implications for a bankrupt business struggling to fulfill its debt obligations.[5]

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1 *See* EXEC. OFFICE OF THE PRESIDENT, THE FINANCIAL CRISIS: FIVE YEARS LATER 3 (2013) ("Five years later, America has fought our way back. Because of these tough choices, over the past three and a half years, our businesses have created seven and a half million new jobs. Manufacturers are adding jobs for the first time since the mid-1990's. We generate more renewable energy than ever, and our exports are at all-time highs. Health care costs are growing at the slowest rate in 50 years—and our deficit has fallen by 50% since the President took office.").

2 Tom Hals, *U.S. Public Companies Seek Bankruptcy at Fastest First-Quarter Rate Since 2010*, REUTERS (Apr. 14, 2015, 5:57 PM), http://www.reuters.com/article/2015/04/14/us-usa-bankruptcy-increase-insight-idUSKBN0N528K20150414.

3 *Id.*

4 *See, e.g.*, *In re* Wilshire Courtyard, CC-10-1275-SaPaki, 2015 WL 1544681 (B.A.P. 9th Cir. Apr. 7, 2015). In *Wilshire Courtyard*, the debtor at the time of bankruptcy owed many creditors a substantial balance on their secured claims, including a $221 million claim. *Id.* at *2. The debtor's total secured debt load aggregated almost $350 million. *Id.* at *1.

5 For example, one company filing for bankruptcy in 2013 sought to cram down a loan on one of its creditors. *See In re* Tex. Grand Prairie Hotel Realty, L.L.C., 710 F.3d 324 (5th Cir. 2013). The creditor in question had a secured claim of approximately $39,080,000 to be repaid over a seven-year term. *Id.* at 327, n.2. The debtor proposed an interest rate of five percent, which was 1.75% above the "prime" rate at the time. *Id.* See *infra* note 61 for more information on the "prime" rate and how it is derived. The creditor, on the other hand, insisted that the debtors had incorrectly calculated this rate, demanding at least an 8.8% interest rate. *Grand Prairie Hotel*, 710 F.3d at 327. By choosing the creditor's rate, the court would have forced the debtor to pay almost double in interest alone, a difference of approximately $7 million. Bankruptcy courts considering Chapter 11 cases do consider the feasibility of the plan as a

Meanwhile, as large Chapter 11[6] cases crowd the dockets, they seem to be governed by a rule of sorts from a tiny Chapter 13[7] case. In *Till v. SCS Credit Corporation*, the Supreme Court of the United States granted certiorari to determine the proper formula for setting an interest rate for a "cram down" loan to a bankrupt Chapter 13 debtor.[8] "Cram down" loans occur when a court confirms the financial reorganization plan submitted by the debtor notwithstanding the objections of a class of creditors to that plan.[9] Before *Till*, federal courts generally agreed that cram down rates should be crafted using a "market" rate, and that courts should compensate the creditor for the delay in receiving a debtor's payment.[10] What courts could not agree on was the correct formula that should be used to determine this rate.[11]

Ultimately the Court in *Till* reached a 4-4-1 plurality decision.[12] Despite a four-justice plurality which favored the formula approach,[13] the lack of a majority decision in favor of this approach rendered the decision merely persuasive, as opposed to binding precedent.[14] The preferred approach of the *Till* plurality has since been widely adopted in the Chapter 13 consumer bankruptcy context.[15] However, the split

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prerequisite of confirmation. *See* 11 U.S.C. § 1129(a)(11) (2012). However, having to repay such a huge amount of interest can greatly affect a company's ability to bounce back, hindering the fundamental goals of Chapter 11 bankruptcy law. *See infra* Section VI.A.

6 Chapter 11 of the Bankruptcy Code provides the requirements for confirmation of a bankrupt business debtor's reorganization plan when that business files for bankruptcy. *See infra* Part I.

7 Chapter 13 of the Bankruptcy Code provides the cram down requirements for a bankrupt consumer creditor and their secured creditors. *See infra* Part I.

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

9 *Id.* at 469.

10 *See, e.g.*, Evabank v. Baxter, 278 B.R. 867, 875 (N.D. Ala. 2002) (citing *In re* Smithwick, 121 F.3d. 211, 212 (5th Cir. 1997)); *see also, e.g.*, Gen. Motors Acceptance Corp. v. Jones, 999 F.2d 63, 66 (3d Cir. 1993).

11 *Till*, 541 U.S. at 469 ("The proceedings in this case that led to our grant of certiorari identified four different methods of determining the appropriate method with which to perform that [cram down] calibration.").

12 *Id.*

13 *Id.* at 479–90; *see also* Dan Schechter, *Supreme Court Approves "Formula Approach" to Cramdown Interest; Ruling Will Affect Subprime Market and May Affect Commercial Finance*, 2004 COMM. FIN. NEWSL. 36 (2004).

14 Justice Stevens wrote the majority opinion in favor of the formula approach, joined by Justice Souter, Justice Ginsburg, and Justice Breyer. *See Till*, 541 U.S. at 467. Among the five remaining justices, Justice Thomas wrote a separate opinion concurring in judgment, and Justice Scalia wrote a dissenting opinion in which the Chief Justice Rehnquist, Justice O'Connor, and Justice Kennedy joined. *See id.* at 485 (Thomas, J., concurring); *id.* at 491 (Scalia, J., dissenting).

15 *See, e.g.*, Drive Fin. Servs., L.P., v. Jordan, 521 F.3d 343, 350 (5th Cir. 2008) ("[W]e hold that the *Till* plurality's adoption of the prime-plus interest rate approach is binding precedent."); *see also In re* Pringle, No. 05-CV-144S, 2006 U.S. Dist. LEXIS 62282, at *20–21 (W.D.N.Y. Aug. 29, 2006) ("[T]he bankruptcy court erred in failing to use a formula or risk-plus method . . . as instructed by *Valenti* and *Till*."); *In re* Jones, 534 B.R. 149, 158 (Bankr. E.D. Ky. 2015) ("The formula approach from *Till* is the appropriate method to establish a cramdown

opinion failed to concretely address whether the decision applied to Chapter 11 business bankruptcy cases.[16] In the wake of this ambiguity, courts confronted with a Chapter 11 bankruptcy cram down rate determination have resorted to a variety of devices, ranging from blindly following the plurality and adopting the formula approach,[17] to using pre-*Till* precedential case law,[18] or to promulgating a two-prong analysis through its interpretation of the *Till* decision.[19] Even within a single circuit, there is often disagreement on which method is proper.[20] This lack of uniformity means that two courts in adjacent circuits with factually similar cases can reach disparate calculations of the cram down interest rate.[21] As long as companies continue to file for Chapter 11 bankruptcy, [22] and their creditors continue to object that the proposed

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rate under [Chapter 13]."); Michael Elson, Note, *Say "AHHH!": A New Approach for Determining the Cram Down Interest Rate after* Till v. SCS Credit, 27 CARDOZO L. REV. 1921, 1938 (2006) ("[Courts] uniformly hold[] that *Till* requires courts to use a formula approach in a [sic] Chapter 13 cram downs.").

16 Gary W. Marsh & Matthew M. Weiss, *Chapter 11 Interest Rates After* Till, 84 AM. BANKR. L.J. 209, 210 (2010).

17 Mark J. Thompson & 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*, 20 FORDHAM J. CORP. & FIN. L. 893, 919 (2015) ("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.") (collecting cases).

18 *See, e.g.*, *In re* MPM Silicones, L.L.C., 531 B.R. 321, 332–33 (S.D.N.Y. 2015) (holding that the court would apply the *Till* formula approach in a manner consistent with Second Circuit precedent).

19 *See, e.g.*, *In re* Am. HomePatient, Inc., 420 F.3d 559 (6th Cir. 2005) ("[W]e decline to blindly adopt *Till*'s endorsement of the formula approach for Chapter 13 cases in the Chapter 11 context. . . . the market rate should be applied in 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."). For a discussion of the varying approaches taken by the federal circuit courts, see *infra* Part IV.

20 *Compare In re* Sundance Self Storage-El Dorado L.P., No. 10-36676-D-11, 2012 Bankr. LEXIS 6144, at *33 (Bankr. E.D. Cal. Apr. 12, 2012) (calculating the cram down interest rate by blending rates from multiple financing products in the market), *with In re* Red Mountain Mach. Co., 471 B.R. 242 (D. Ariz. 2012) (affirming use of the formula approach to calculate the cram down interest rate).

21 See the discussion of how the proposed "prime-plus-plus" approach would apply to *In re Prussia Assocs.*, 322 B.R. 572 (Bankr. E.D. Penn. 2005), and *In re T-H New Orleans Ltd. P'ship*, 116 F.3d 790 (5th Cir. 1997), in Section V.B.

22 *See* Johnathan Randles, *Bankruptcy Cases To Watch in 2016*, LAW360 (Dec. 24, 2015, 8:37 PM), http://www.law360.com/articles/737505/bankruptcy-cases-to-watch-in-2016; *see also How Many More Oil & Gas Companies Will File for Bankruptcy?*, PEAKOIL.COM (Sept. 25, 2015), http://peakoil.com/business/how-many-more-oil-gas-companies-will-file-for-bankruptcy; Lisa Allen & Kelsey Butler, *Peabody, Arch Coal May File Chapter 11 Bankruptcy on Obama Rules*, THESTREET (Aug. 5, 2015, 9:16 AM), http://www.thestreet.com/story/13244580/1/peabody-arch-coal-may-file-chapter-11-bankruptcy-on-obama-rules.html; Lisa Fickenscher, *Retailer Joyce Leslie Files for Chapter 11 Bankruptcy*, N.Y. POST (Jan. 11, 2016, 10:20 PM), http://nypost.com/2016/01/11/retailer-joyce-leslie-files-for-chapter-11-bankruptcy.

interest rate is insufficient, the need for better guidance and uniformity on the proper interest rate determination method is greatly needed.

This Note will argue that uniform application of the law by federal bankruptcy courts requires the consistent application of one cram down interest rate formula.[23] Moreover, this Note will argue that the current methodologies employed by federal bankruptcy courts inadequately serve the goals of Chapter 11 bankruptcy.[24] Instead, this Note proposes that courts adopt a "prime-plus-plus" method.[25] The "prime-plus-plus" method follows the framework of the "prime-plus" method approved in *Till*, by beginning with the national prime rate and increasing that rate by a court-determined risk premium.[26] However, unlike the formula approach approved in *Till*,[27] the "prime-plus-plus" method *also* directs bankruptcy judges to consider evidence of an efficient market when calculating that risk premium.[28] Part I will analyze and explain cram down rates, and how they function in both the Chapter 11 and the Chapter 13 context.[29] Part II will describe the factual background of *Till*, as well as the four current approaches used to determine the cram down rate.[30] Part III will describe how the federal bankruptcy courts continue to inconsistently calculate the cram down interest rate.[31] Part IV will discuss how two seemingly contradictory portions of the *Till* plurality opinion can be reconciled in order to ensure *Till*'s proper application to Chapter 11 cram down.[32] Part V proposes the "prime-plus-plus" method to cram down interest rate determination, and discusses how the method applies to relevant case law.[33] This Note will conclude by addressing counterarguments in Parts V–VI, including counterarguments that the current methods obviate the concerns raised by this Note better than the "prime-plus-plus" method.[34]

I. THE CHAPTER 13 AND CHAPTER 11 CRAM DOWN PROVISIONS

The cram down provisions of the Bankruptcy Code (Code) are located in statutes that set forth the minimal requirements for

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23 *See infra* Parts V–VI.
24 *See infra* Part VI.
25 *See infra* Part V.
26 *Id.*; *see also* Till v. SCS Credit Corp., 541 U.S. 465, 479–80 (2004).
27 *Id.*
28 *See infra* Part V.
29 *See infra* Part I.
30 *See infra* Part II.
31 *See infra* Part III.
32 *See infra* Part IV.
33 *See infra* Part V.
34 *See infra* Parts V–VI.

confirming a Chapter 13 or a Chapter 11 reorganization plan.[35] Although the term "cram down" is never actually used in the Code, the term refers to the court's ability to approve the plan over the objections of a class of creditors.[36] Thus, the provisions serve to "cram" the debtor's plan "down" the throats of the objecting creditors.[37]

Chapter 13 of the Code provides for the reorganization of an individual consumer's debts when that person files for bankruptcy under that chapter.[38] Once a debtor submits her Chapter 13 reorganization plan,[39] the bankruptcy court is required to hold a confirmation hearing on the plan.[40] As part of the cram down restriction, the debtor has the option to surrender the property securing the creditor's claim to the creditor.[41] But if the debtor prefers to retain the property securing the loan, she must instead pay deferred cash payments equal to the present value of the secured claim.[42] Disagreements over the proper formula for determining the interest rate

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[35] 11 U.S.C. §§ 1322–1325 (2012) are the statutes guiding confirmation of Chapter 13 consumer bankruptcy reorganization plans. 11 U.S.C. § 1129 is the statute guiding confirmation of Chapter 11 business bankruptcy reorganization plans.

[36] Jacob D. Krawitz, Note, Till v. SCS Credit Corp. *(*In Re Till*): A Rash Conclusion?*, 23 ANN. REV. BANKING & FIN. L. 889, 891 (2004). In Chapter 11, at least one class of impaired creditors must approve the plan in order for the "cram down" plan to be confirmed. *See* 11 U.S.C. § 1129(a)(10).

[37] Phillip J. Giese, Note, Till v. SCS Credit Corp.*: Can You "*Till*" Me How to Cram This Down? The Supreme Court Addresses the Proper Approach to Calculating Cram Down Interest Rates*, 33 PEPP. L. REV. 133, 135 (2005).

[38] 11 U.S.C. § 1322. Unlike Chapter 11, involuntary Chapter 13 filings are not allowed, due to sensitivity that the proceeding would then resemble "peonage," and would violate the Thirteenth Amendment. *See* 11 U.S.C. § 303(a); *see also* Karen Gross, *The Debtor as Modern Day Peon: A Problem of Unconstitutional Conditions*, 65 NOTRE DAME L. REV. 165, 167–68 (1990). Note that individual consumer debtors also have the ability to file under Chapter 7. *See* 11 U.S.C. §§ 701–727 (2012); *see also* DAVID GRAY CARLSON, THE LAW OF DEBTORS AND CREDITORS 179 (2010). A key difference between Chapter 7 and Chapter 13 is that in Chapter 7, the debtor retains only exempt assets, and non-exempt assets are surrendered for liquidation and distribution. *See* 11 U.S.C. §§ 541(a)(1), 522, 726. In Chapter 13, on the other hand, the debtor may retain the assets that secure his creditor's loans and can pay his creditor in a stream of deferred cash payments. *See* 11 U.S.C. §§ 1306(b), 1325(a)(5).

[39] A Chapter 13 debtor has a very short deadline to file her Chapter 13 plan and must either file her Chapter 13 plan with and at the same time as her Chapter 13 petition or within fourteen days of filing her Chapter 13 petition. FED. R. BANKR. P. 3015(b). This rule, paired with the quickness with which the court must hold a confirmation hearing under § 1324, demonstrates the accelerated pace at which Chapter 13 bankruptcies proceed. *See* 11 U.S.C. § 1324.

[40] § 1324(a). The court must schedule a confirmation hearing even without any party having filed a motion to confirm the plan. *See id.* Section 1324 also strictly provides that the court must hold the confirmation hearing between twenty and forty-five days after the date of the meeting of creditors under § 341(a), unless it would be in the creditors' best interests to hold the hearing at an earlier date. *See id.* § 1324(b). This serves as yet another example of the quickness with which Chapter 13 bankruptcies proceed. *See* sources cited *supra* note 39.

[41] § 1325(a)(5)(C).

[42] § 1325(a)(5)(B); *see also* Krawitz, *supra* note 36, at 891 & n.13.

applied to these Chapter 13 secured claims eventually led to the Supreme Court's decision in *Till*.[43]

Chapter 11 provides the requirements for confirmation of the financial reorganization of a business when that business files for bankruptcy.[44] Chapter 11 also provides a cram down option when a secured creditor does not approve of its plan. As long as the plan is deemed to be "fair and equitable,"[45] the debtor's plan must dictate either that (1) the creditors retain the lien securing the claim and receive deferred cash payments totaling at least the allowed amount of the claim as of the effective date of the plan, (2) the debtor sells the property that is subject to the liens securing the claims, or (3) the creditors must receive the "indubitable equivalent" of their claims.[46]

These alternatives comprise the Chapter 11 cram down provisions.[47] Thus, in both a Chapter 13 and a Chapter 11 bankruptcy

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43 Till v. SCS Credit Corp., 541 U.S. 465, 473–74 (2004) ("The Bankruptcy Code provides little guidance as to which of the rates of interest advocated by the four opinions in this case—the formula rate, the coerced loan rate, the presumptive contract rate, or the cost of funds rate—Congress had in mind when it adopted the cramdown provision. . . . The challenge for bankruptcy courts reviewing such repayment schemes, therefore, is to choose an interest rate sufficient to compensate the creditor for these concerns.").

44 11 U.S.C. § 1129. Even though Chapter 11's structure and legislative history indicate that its provisions were intended for business debtors, the Supreme Court has held that an individual person may be a Chapter 11 debtor under § 109(d) of Title 11 of the U. S. Code. Toibb v. Radloff, 501 U.S. 157, 160 (1991); *see also* 11 U.S.C. § 109(d) ("Only a railroad, a person that may be a debtor under chapter 7 of this title . . . may be a debtor under chapter 11 of this title."); § 109(b) ("A person may be a debtor under chapter 7 of this title only if such person is not . . . (1) a railroad; (2) a domestic insurance company, bank . . . credit union . . . ."). "Individuals filing under Chapter 11 are generally one of three types: small businesses operated as sole proprietorships, individuals who have made personal guarantees, or individuals with significant mortgage debt." Jessica R. Ellis, Note, *The Absolute Priority Rule for Individuals After* Maharaj, Lively, *and* Stephens*: Negotiations or Game Over?*, 55 ARIZ. L. REV. 1141, 1142–43 (2013). Reasons an individual might file under Chapter 11 include the ability to reorganize one's assets, as opposed to liquidating them, as well as the fact that some debtors are ineligible for Chapter 7 because they exceed the "median income test." *Id.* at 1144 & n.16 ("The median income test states that a court may dismiss or convert a Chapter 7 filing if the debtor's current monthly income . . . is not less than the lesser of (1) 25 percent of the debtor's nonpriority unsecured claims in the case, or $7,475, whichever is greater; or (2) $12,475."). However, an individual who files under Chapter 11 as opposed to Chapter 7 or 13 will also be subject to Chapter 11's higher filing fees, higher attorney fees, and the absolute priority rule, factors not applicable in Chapter 7 or 13. *Id.* at 1143.

45 § 1129(b)(1) ("[T]he court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.").

46 *Id.* § 1129(b)(2)(A).

47 This provision serves as the Chapter 11 equivalent of the Chapter 13 provisions that formed the subject of the *Till* litigation. *In re* Till, 301 F.3d 583, 587 (7th Cir. 2002), *rev'd sub nom. Till*, 541 U.S. 465 ("Both Chapter 11, and Chapter 12, contain analogous cramdown provisions. . . . Courts have considered all . . . provisions to be similar and have analyzed them interchangeably." (citations omitted)). Although the cram down provisions of Chapter 11 also allow the debtor to provide the creditor with the "indubitable equivalent" of their claim, the

filing, a debtor's reorganization plan may be confirmed using the cram down provisions over the objections of creditors, so long as all of the conditions provided by these statutes are met.[48]

Although the statutory language in the provisions of these two statutes are very similar, the hearings determining the confirmability of a Chapter 13 or a Chapter 11 plan can be very different. Chapter 13 confirmation hearings tend to be brief.[49] To determine the plan's feasibility, the bankruptcy court rarely relies on evidence outside of the disposable income available in a debtor's budget and the debtor's history of making plan payments.[50] On the other hand, a Chapter 11 confirmation hearing can be much more complex. The court often must review financial statements and projections, hear presentations of expert testimony, and deal with a breadth of financial history vastly more complicated than that in the case of an individual Chapter 13 consumer.[51] Despite these major differences, courts have often addressed cram down proceedings in both Chapter 11 and Chapter 13 the same way.[52] While this may have led to administrative ease in some contexts, it left the applicability of the *Till* decision to a Chapter 11 case ambiguous.

Supreme Court has held that the preference for a specific statutory provision's application when a more general provision also applies mandates that one of the more specific provisions of the Code control when possible in cram down. *See* § 1129(b)(2)(A)(iii); *see also* RadLAX Gateway Hotel, L.L.C. v. Amalgamated Bank, 132 S. Ct. 2065, 2071 (2012). Thus, because the debtor in each case discussed in this Note wishes to retain the property securing the creditor's claim, the application of cram down provisions other than § 1129(b)(2)(A)(i) will not be examined in this Note.

48 It should be noted that in Chapter 11, it is possible that all the classes of creditors to a Chapter 11 bankruptcy will vote to approve the plan, and thus there would be no need to invoke the cram down provisions. *See* 11 U.S.C. §§ 1126, 1129(a)(8). But if any class of creditors objects to the Chapter 11 plan, the cram down provisions have to be met. § 1129(a)(10) (providing that a Chapter 11 plan may be confirmed notwithstanding the existence of objecting creditors if at least one impaired class accepts the plan); *see generally id.* § 1129(a). On the other hand, there is no voting in a Chapter 13 bankruptcy; instead of class voting procedures, each individual "party in interest may object to confirmation of the plan." 11 U.S.C. § 1324. Thus, cram down in Chapter 13 just means meeting the provisions of § 1325(a)(5), which always must be met if the plan is to be confirmed.

49 Deborah Langehennig, *Application of the* Till *Interest Rate*, 68 TEX. B.J. 1022, 1026 (2005).

50 *Id.*

51 *Id.* at 1026–27. "A bankruptcy court is able to confirm several hundred Chapter 13 plans in the same span of time which may be needed to confirm one contested Chapter 11 plan." *Id.* at 1027.

52 *See supra* note 47. Similarities between the two provisions include: that the present value provisions of Chapter 13 carry over to Chapter 11; that Chapter 13 debtors may modify their secured claims as may Chapter 11 debtors; and that "the 'objective economic analysis' required under Chapter 13 'to treat similarly situated creditors similarly,' and to ensure that 'the debtor's interest payments will adequately compensate all such creditors for the time and value of their money and the risk of default' is equally applicable to Chapter 11 cases." *In re* Cantwell, 336 B.R. 688, 692 (Bankr. D.N.J. 2006) ("The *American HomePatient* and *Prussia Associates* decisions confirm that the three considerations identified in *Till* are equally relevant in the Chapter 11 context.").

II. The Cram Down Methods Discussed in *Till*

A. *The Factual Background of* Till

An examination of the context in *Till v. SCS Credit Corporation* highlights the different methodologies available for determining a cram down interest rate.[53] The Tills purchased a used truck for $6,395.00 plus $330.75 in fees and taxes.[54] They made a $300.00 down payment and financed the balance of the purchase price by entering into a retail installment contract.[55] The contract provided for sixty-eight biweekly payments with a yearly interest rate of twenty-one percent and, as is typical, the lender retained a security interest in the truck.[56] Subsequently, the Tills defaulted on their loan and filed for Chapter 13 bankruptcy.[57] At that time, the value of the truck, and thus the value of the collateral securing the creditor's claim, was $4,000.00.[58] This means that the creditor truck-retailer had a secured claim for $4,000.00 against the bankrupt Tills. Under the cram down provisions of Chapter 13, the Tills could satisfy this claim through a stream of deferred payments to the creditor equating with the value of the truck.[59] The issue remained, however, of what interest rate to apply to these deferred payments.

The debtors proposed a 9.5% interest rate on their secured claim.[60] They arrived at this rate by starting with the rate used by banks when making a low-risk loan to their most creditworthy borrower, commonly referred to as the "national prime rate,"[61] of eight percent and added

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

54 *Id.* at 469.

55 *Id.* at 470.

56 *Id.*

57 *Id.*

58 *Id.* Under § 506(a), the creditor's claim was bifurcated into a secured and an unsecured claim: the creditor was secured for an amount consonant with the value of the collateral and an unsecured creditor for the remaining balance. *See* 11 U.S.C. § 506(a) (2012); *see also* Martin A. Frey & Sidney K. Swinson, Introduction to Bankruptcy Law 411 (6th ed. 2012).

59 11 U.S.C. § 1325(a)(5). As per *Associates Commercial Corp. v. Rash*, valuation is supposed to be the replacement value of the truck securing the loan. 520 U.S. 953, 964 (1997). However, in 2005, § 502(a)(2) was added to the Bankruptcy Code to govern the valuation standard. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23, § 201 (codified as 11 U.S.C. § 502). Additionally, the so-called "hanging paragraph" to § 1325 was also added and requires that when the truck securing the loan was acquired within 910 days before the bankruptcy, the amount of the *total claim secured* by the truck—as opposed to the truck's valuation—is the amount that must be paid over time. *See* 11 U.S.C. §1325(a). However, *Till* was heard before these provisions were enacted, so the provisions of § 1325(a)(5) governed what the creditors in *Till* were entitled to receive: the value of the truck. *Till*, 541 U.S. at 470.

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

61 The "prime rate" represents the rate a bank would charge a creditworthy borrower and can be found in the daily newspaper. *See infra* note 94.

1.5% to account for the risk of nonpayment by bankrupt debtors.[62] The creditor objected that this rate was too low, and argued that it was entitled to a rate of twenty-one percent.[63] The creditor argued that this is the rate that it would obtain if it could foreclose the lien on the vehicle securing its claim, and reinvest the proceeds of that foreclosure in loans of equivalent duration and risk as the loan originally made to the debtors.[64]

The bankruptcy court agreed with the Tills, and confirmed their plan with the 9.5% interest rate over the objections of the creditor.[65] The district court reversed, agreeing with the creditor that the proper interest rate to be applied is the rate that the creditor could obtain "if it had foreclosed on the loan, sold the collateral, and reinvested the proceeds in loans of equivalent duration and risk" to that of the original loan.[66] The Seventh Circuit agreed with the district court's rate,[67] but modified the correct methodology for future calculations to have the contract rate serve as the presumptive cram down rate.[68]

On appeal, the Supreme Court granted certiorari to resolve the disagreement among the courts as to what formula should be used to determine the interest rate applied to a stream of deferred installment cram down payments.[69] In a plurality opinion, the Court first noted that the Code does not actually provide any guidance on which formula to

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

63 *Id.*

64 *Id.* It is worth noting that if capital markets were *truly* efficient, then the twenty-one percent rate argued for by the creditor would include compensation for the risk of non-payment for loans of the type the subprime lender typically made. *See* Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 133 S. Ct. 1184, 1192 (2013) ("[W]ell developed markets are efficient processors of public information. . . . 'reflec[ting] all publicly available information.'" (quoting Basic Inc. v. Levinson, 485 U.S. 224, 246 (1988))); Christopher Paul Saari, Note, *The Efficient Capital Market Hypothesis, Economic Theory and the Regulation of the Securities Industry*, 29 STAN. L. REV. 1031, 1031 (1977) ("A market in which prices always fully reflect available information is an 'efficient' market."). Because a truly efficient market would fully and accurately reflect information about a company, a company's market rate should represent the true value of the company, including any risk of non-payment. This line of reasoning would render any additional risk premium a windfall for creditors, as the debtor is paying them twice for the same risk factors.

65 *Till*, 541 U.S. at 477–80.

66 *Id.* at 472. This method is known as the "coerced loan" method for determining cram down rates and is discussed *infra* in Section II.B.

67 *Till*, 541 U.S. at 472.

68 *Id.* at 472–73. ("The court recognized . . . that using the contract rate would not 'duplicat[e] precisely . . . the present value of the collateral to the creditor' because loans to bankrupt, court-supervised debtors 'involve some risks that would not be incurred in a new loan to a debtor not in default' and also produce 'some economies.' To correct for these inaccuracies, the majority held that the original contract rate should 'serve as the presumptive [cramdown] rate.'" (citation omitted)). The Seventh Circuit further held that either the creditor or the debtor could challenge the presumptive rate with "evidence that a higher or lower rate should apply." *Id.*

69 *Id.* at 469.

use.[70] Instead, it simply requires that the secured creditor be compensated at least as much as the "value, as of the effective date of the plan" of the property securing the creditor's claim.[71] Although this condition would be easily met with one large lump-sum payment, the Court recognized that discharging this sum in a series of payments complicates matters because one must take inflation and risk of nonpayment into account.[72] Ultimately, the Court discussed all four prevailing methods of computing a cram down interest rate before reversing the decision of the Seventh Circuit in favor of the formula approach used by the district court.[73] The following sections summarize the Supreme Court's analysis in *Till* of the four different methodologies.

B. *The "Coerced Loan" Approach*

At the time that *Till* was decided, a majority of courts of appeals had been using the "coerced" or "forced" loan method.[74] Under this method, the bankruptcy court should apply the interest rate that would apply to a hypothetical new loan the creditor was forced to extend to the debtor.[75] Thus, this method provides the creditor with the rate of

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70 *Id.* at 473.

71 *Id.* at 473–74 n.4.

72 *Id.* at 474. Additionally, the Court identified three considerations governing the choice of formula: (1) that courts must discount the deferred payments to their present value so that the creditor receives at least the value of its claim; (2) 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'"; and (3) that "from the point of view of a creditor, the cramdown provision mandates an objective rather than a subjective inquiry." *Id.* at 474–76.

73 *Id.* It has been argued that because less than five justices agreed in favoring the formula approach that this approach was not actually favored by the *Till* decision. *See* Franklind Lea et al., *infra* note 107 (citing Marks v. U.S., 430 U.S. 188 (1977)). However, another commentator has argued that the narrowest common ground among five justices is that "the *Till* Court reversed the reversal of, and therefore affirmed, the bankruptcy court's confirmation of a cram down with an interest rate set 1.5% above the prime rate." *See* Elson, *supra* note 15, at 1937. Because the general consensus among bankruptcy courts is that the *Till* plurality at least recommended the formula approach, I will proceed under this assumption. *See* cases cited *supra* note 15.

74 Krawitz, *supra* note 36, at 900 n.91 (collecting cases). This was also the method used by the Seventh Circuit in a Chapter 12 case pre-*Till*. *See* Koopmans v. Farm Credit Servs. of Mid-Am., ACA, 102 F.3d 874 (7th Cir. 1996). "Chapter 12 was added to the Bankruptcy Code in 1986. It is designed specifically for the reorganization of family farms. It is closely modeled after Chapter 13 . . . although it has a higher debt ceiling . . . ." Philip L. Kunkel & Scott T. Larison, *Bankruptcy: Chapter 12 Reorganization*, REGENTS U. MINN. (1998), http://www.agrisk.umn.edu/cache/ARL00786.htm.

75 *Koopmans*, 102 F.3d at 874–75. It is interesting to note that it may be impossible to determine the market rate that would apply to a "forced" loan. Since interest rates are set competitively, if the loan is "forced," by definition there would be no market rate to apply. *See In re* Jordan, 130 B.R. 185, 189 (Bankr. D.N.J. 1991); *see also* John K. Pearson et al., *Ending the*

interest it would have obtained by foreclosing and reinvesting the proceeds in a similar loan of equivalent duration and risk.[76] To ascertain this value, courts examine similar loans made in the same region, as well as the cost to creditors to assume the hypothetical new loan.[77]

However, the Supreme Court rejected the coerced loan approach because it requires bankruptcy courts to consider evidence about the market for comparable loans to similar *nonbankrupt* debtors, which is outside of the scope of their usual tasks.[78] The Supreme Court also noted that the method overcompensates creditors.[79] In addition to the coerced loan approach, the *Till* Court examined and rejected other cram down methods, as discussed below.

C. *The "Presumptive Contract" Approach*

Under the "presumptive contract" approach some circuit courts of appeals imposed a rebuttable presumption in favor of using the original contract rate as the cram down interest rate.[80] The Seventh Circuit adopted this presumption in favor of the contract rate in *Till*.[81]

Judicial Snipe Hunt: The Search for the Cramdown Interest Rate, 4 AM. BANKR. INST. L. REV. 35, 45–46 (1996).

76 *In re* Till, 301 F.3d 583, 591 (7th Cir. 2002), *rev'd sub nom. Till*, 541 U.S. 465.

77 *See* Gen. Motors Acceptance Corp. v. Jones, 999 F.2d 63, 67–68 (3d Cir. 1993).

78 *Till*, 541 U.S. at 477. It should be noted that this Note will propose that evidence of an efficient market should be one of the factors included in the calculation of the appropriate upward risk adjustment on the prime rate. *See infra* Part V. However, looking to this efficient market does not require bankruptcy courts to consider evidence about the market for comparable loans to similar nonbankrupt debtors. Instead, the efficient market sought in this analysis is a market for similar debtors seeking debtor-in-possession financing. *See infra* Wong, note 179, at 1949–50 (describing debtor-in-possession financing). "The Bankruptcy Code defines chapter 11 debtors who remain in possession of estate assets as 'debtors in possession,' and new credit extended to a chapter 11 debtor is commonly called 'debtor-in-possession financing' or 'DIP financing.'" HENRY P. BAER, JR. ET AL, DEBTOR-IN-POSSESSION FINANCING: FUNDING A CHAPTER 11 CASE (Felicia Gerber Perlman ed., 2012); *see generally* Huebner, *infra note* 178, at 30–33 (discussing debtor-in-possession financing). Thus, the proposed method asks bankruptcy judges to consider evidence of other lenders in the market that are willing to lend to companies similar to the debtor, who are also in Chapter 11. The method does *not* prompt bankruptcy judges to consider evidence of willing lenders to companies similar to the debtor but not in bankruptcy. *See infra* Part V.

79 *Till*, 541 U.S. at 477 ("[T]he 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 cramdown loans."). Even before *Till*, the coerced loan approach had been criticized in the Second Circuit for including the lender's profit into the market rate. *In re* Valenti, 105 F.3d 55, 64 (2d Cir. 1997) ("[T]he value of a creditor's allowed claim does not include any degree of profit. There is no reason, therefore, that the interest rate should account for profit.").

80 *See Gen. Motors*, 999 F.2d at 70–71 ("[W]e believe it would be appropriate for bankruptcy courts to accept a plan utilizing the contract rate if the creditor fails to come forward with persuasive evidence that its current rate is in excess of the contract rate. Conversely, utilizing the same rebuttable presumption approach, if a debtor proposes a plan

The Supreme Court plurality, along with Justice Thomas, however, criticized the presumptive contract approach for reasons similar to the coerced loan approach, such as imposing significant evidentiary costs, being complicated, and making creditors whole rather than ensuring that the debtor pays the required present value of the loan.[82] Accordingly, the Supreme Court rejected both of these approaches for determining the proper cram down rate in a Chapter 13 reorganization plan.[83]

On the other hand, the dissent, led by Justice Scalia, endorsed the presumptive contract rate as the best indicator of actual risk.[84] The dissent argued that the formula approach undercompensated creditors for loaning to a risky, bankrupt borrower,[85] and that the contract rate served as the best proxy for the market rate in the absence of other evidence.[86]

D. *The "Cost of Funds" Method*

Under a third approach, the "cost of funds" approach, a bankruptcy court looks to the interest rate that the creditor would have

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with a rate less than the contract rate, it would be appropriate . . . for a bankruptcy court to require the debtor to come forward with some evidence that the creditor's current rate is less than the contract rate." (footnote omitted)); *see also In re* Smithwick, 121 F.3d 211, 214 (5th Cir. 1997) (adopting the rebuttable presumption in favor of the contract as described in *General Motors*). This method began in the Third and Fifth Circuits, which were partly motivated to reduce litigation costs for the parties. *See id.* ("Thus, to 'reduce litigation expense,' the [Third Circuit] adopted [the presumptive contract approach] . . . . We are persuaded by the Third Circuit approach.").

81 *In re* Till, 301 F.3d. 583, 592 (7th Cir. 2002), *rev'd sub nom. Till*, 541 U.S. 465 ("[L]ike our colleagues in the Third Circuit, and Fifth Circuit, we believe 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." (citations omitted)).

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

83 *Id.* ("These considerations lead us to reject the coerced loan, presumptive contract rate, and cost of funds approaches. Each of these approaches 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.").

84 *Id.* at 491–92 (Scalia, J., dissenting) ("I believe that, in practice, [the formula] approach will systematically undercompensate secured creditors for the true risks of default. I would instead adopt the contract rate . . . as a presumption that the bankruptcy judge could revise on motion of either party.").

85 *Id.* The dissent further argued that,

> [w]hile 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.

86 Elson, *supra* note 15, at 1935.

to pay to borrow the amount equal to the collateral's value.[87] Although advocated by the leading treatise,[88] and adopted in some bankruptcy courts,[89] it has not been adopted by any of the courts of appeals.[90] Despite lauding this approach for ignoring the terms of the parties' original contract, the Supreme Court rejected the method, arguing that it focused on the creditworthiness of the creditor instead of the debtor.[91] Furthermore, this approach, like the coerced loan and presumptive contract approaches, was critiqued for imposing high evidentiary burdens on the debtors, being complicated, and aiming to make each individual creditor whole rather than to ensure that the debtor's payments have the requisite present value.[92]

E. *The Formula Approach*

The "formula approach" was favored by the *Till* plurality.[93] Under this approach, the bankruptcy judge first looks to the daily press to find the current national "prime rate."[94] The Supreme Court reasoned that this number reflects the best estimate by the financial market of what a commercial bank would charge a creditworthy commercial borrower to compensate for the opportunity costs of the loan, inflation, and the

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

88 COLLIER ON BANKRUPTCY ¶ 1325.06, § 3 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2015).

89 *See, e.g.*, Gen. Motors Acceptance Corp. v. Valenti, 191 B.R. 521 (N.D.N.Y. 1995).

90 Krawitz, *supra* note 36, at 904.

91 Till v. SCS Credit Corp., 541 U.S. at 478.

92 *Id.* at 477–78. "For example, like the presumptive contract rate approach, the cost of funds approach imposes a significant evidentiary burden, as a debtor seeking to rebut a creditor's asserted cost of borrowing must introduce expert testimony about the creditor's financial condition." *Id.* at 478.

93 *Id.* at 479–80 ([T]he prime-plus or formula rate best comports with the purposes of the Bankruptcy Code."). *But see supra* text accompanying note 73.

94 *Id.* at 479; *see also Prime Rate*, BLACK'S LAW DICTIONARY (10th ed. 2014). "The prime rate is the rate at which individual banks lend to their most creditworthy customers, including large corporations. It is often used as a benchmark for other loans like credit card and small-business loans." Anita Balakrishnan, *Banks Raise Prime Rates; Wells Fargo Moves to 3.5%*, CNBC (Dec. 16, 2015, 2:58 PM), http://www.cnbc.com/2015/12/16/wells-fargo-bank-announced-wednesday-it-would-increase-its-prime-rate-to-35-percent.html. Interestingly, this definition of the prime rate led to a flurry of litigation as plaintiffs alleged that banks violate the Sherman Act by conspiring to misrepresent that the "prime rate" was the lowest rate available, when in fact they have offered some large borrowers financing at interest rates below the prime rate. *See, e.g.*, Lum v. Bank of Am., 361 F.3d 217 (3d Cir. 2004); *see generally 3d Cir. Rejects Racketeering, Antitrust Suit Against Banks:* Lum v. Bank of Am., 12 ANDREWS ANTITRUST LITIG. REP. 5 (2004). These "prime rate fraud" suits sometimes took the form of RICO claims. *See* Kenneth R. Wallentine, *Rico and the Prime: Taking a Bite Out of Crime?*, 4 UTAH B.J. 7, 7 (1991) ("One major type of RICO suits brought against lenders is based on 'prime rate fraud,' where a lender promises to extend credit to a customer at the prime rate and the customer later discovers that 'below-prime' loans have been extended to other borrowers.") (collecting cases).

debtor's risk of default.[95] Next, the judge is to take this rate and augment it for the greater risk of nonpayment presented by the bankrupt debtor, resulting in a "prime-plus" rate.[96] The appropriate amount of adjustment is to be determined based on evidence presented at the confirmation hearing.[97] The *Till* Court noticed that the bankruptcy court had used a risk adjustment of 1.5%, which was within the adjustment range of one percent to three percent generally acceptable by courts.[98]

The Supreme Court noted many advantages to this approach that were lacking by those previously discussed. First, there is a fairly low evidentiary cost to the parties, being that some of the evidence required will already be included in the debtor's bankruptcy filings.[99] Second, by beginning with a presumptively low rate, the burden of evidentiary proof shifts to the corporate creditors, who likely have better access to information about the market than the individual debtor, to raise the rate.[100] And third, the Supreme Court also saw this exercise of risk adjustment as within the bankruptcy judges' scope of expertise.[101]

Till was a 4-4-1 plurality decision.[102] In Justice Thomas's concurrence, he argued that the plain reading of the statute did not

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95 *Till*, 541 U.S. at 479.

96 *Id.*

97 *Id.* ("The appropriate size of that risk adjustment depends, of course, on such factors as the circumstances of the estate, the nature of the security, and the duration and feasibility of the reorganization plan. The court must therefore hold a hearing at which the debtor and any creditors may present evidence about the appropriate risk adjustment."). For more information on confirmation hearings, see *supra* Part I.

98 *Till*, 541 U.S. at 480.

99 *Id.* at 479.

100 *Id.* In a Chapter 11 case, however, it is not always clear that creditors have better access to the market than the debtors, being that Chapter 11 debtors may be large companies with access to financial advisors or other resources. *See, e.g.*, Lukas I. Alpert, *Gawker Files for Bankruptcy, Will Be Put Up for Auction*, WALL ST. J. (June 10, 2016, 4:55 PM), http://www.wsj.com/articles/gawker-declaring-bankruptcy-will-be-put-up-for-auction-1465578030?mg=id-wsj.

101 Alpert, *supra* note 100. It should be noted that later courts have doubted bankruptcy courts' competency in calculating the risk premium as recommended by *Till*. *See, e.g.*, *In re* Walkabout Creek Ltd. Dividend Hous. Ass'n, 460 B.R. 567, 577 (Bankr. D.C. 2011) ("The Court in *Till* noted that courts following the formula approach have generally fixed the risk premium at 1% to 3%. That, of course, is just an observation devoid of any discussion of the facts of the cases in which generally such an adjustment was made. . . . The difficulty is that the Court gave little guidance as to how a risk premium *number* is to be arrived at after a bankruptcy judge fully considers all the factors that bear on risk. Although the Court in *Till* listed some factors a bankruptcy court should consider in arriving at a risk adjustment, the Court gave no explanation for how bankruptcy courts are supposed to *quantify* a risk adjustment after considering those factors." (citation omitted)). The *Walkabout Creek* court reasoned that although it may be within bankruptcy judges' area of expertise to determine whether a Chapter 11 plan is likely to fail, it does not follow that bankruptcy judges have expertise in quantifying risk premium factors. *Id.*

102 *Till*, 541 U.S. at 465.

require an adjustment for the risk of nonpayment by the debtor.[103] Thus, he argued that generally the risk-free rate is the appropriate rate to be applied.[104] His argument was based on the fact that, if a plan has been confirmed, the court has already determined that the plan complies with § 1325(a)(6), and thus, that the debtor will be able to successfully meet all of his payments under the approved plan.[105] Additionally, Justice Thomas reasoned that the plain language of the statute did not require an upward adjustment for the delay in repayment, and instead only required that the debtor, through a stream of deferred payments, pay the present value of the creditor's claim.[106]

Without a majority ruling, courts have interpreted the precedential value of *Till* in many different ways. However, because the Supreme Court reversed the Seventh Circuit, a narrow way of interpreting the decision is that the coerced loan and the presumptive contract approaches were rejected as incorrect approaches.[107] Another interpretation is that the *Till* court "reversed the reversal of, and therefore affirmed," the bankruptcy court's use of the formula approach.[108] Despite the many possible interpretations of the *Till*

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103 *Id.* at 486 (Thomas, J., concurring) ("But the statute that Congress enacted does not require a debtor-specific risk adjustment that would put secured creditors in the same position as if they had made another loan."). One commentator has argued that by concurring only in the judgment of *Till*, but arguing that secured creditors are entitled to nothing more than the risk-free rate of interest, Justice Thomas created a fifth method of calculating cram down rates. *See* Matthew Henschen O'Brien, Note, Till*ing the Cram Down Landscape: Using Securitization Data to Expose the Fundamental Fallacies of* Till, 59 VAND. L. REV. 257, 261 (2006). However, if it is truly the case that Justice Thomas created a fifth method of cram down rate determination, it is worth noting that his method has not garnered any followers. *See* Thompson & McDonough, *supra* note 17, at 918 n.116 ("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. . . . 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.").

104 *Till*, 541 U.S. at 487 ("In most, if not all, cases, where the plan proposes simply a stream of cash payments, the appropriate risk-free rate should suffice.").

105 *Id.* at 490. *See* 11 U.S.C. § 1325(a)(6) (2012) ("Except as provided in subsection (b), the court shall confirm a plan if . . . the debtor will be able to make all payments under the plan and to comply with the plan . . . .").

106 *Till*, 541 U.S. at 485–86 (Thomas, J., concurring).

107 Elson, *supra* note 15, at 1936 ("[T]he Supreme Court directs lower courts to give precedential value to the narrowest grounds agreed upon by a majority of justices between the plurality and the [m]any concurrences."). In interpreting the precedential value of the *Till* plurality, one commentator has suggested that, "[o]nly the portions of the opinions that 'overlap' are binding on the lower courts, and the remainder becomes *dicta* with no precedential value." Franklind Lea et al., *Their Voices Boomed Un-*Till *We Could Hear Them No More*, 34 AM. BANKR. INST. J. 12, 12 (2015).

108 *See* Elson, *supra* note 15, at 1937. Additionally, Elson points out that between the plurality and the dissent, eight justices agreed that a risk component ought to be added to the interest rate, and that the parties merely disagreed about which party bears the burden of establishing the degree of risk. *Id.* Because courts have generally interpreted the *Till* decision as

plurality decision, most courts have understood the decision as recommending the formula approach as preferred.[109] Additionally, although the Court in *Till* declined to "decide the proper scale for the risk adjustment,"[110] this one percent to three percent range has become the accepted range in practice for risk adjustments using the formula approach.[111]

III. THE POST-*TILL* CIRCUIT SPLIT

A. Till*'s Applicability to Chapter 11 Cases*

After *Till* was decided, bankruptcy courts disagreed on whether the decision would apply to both Chapter 11 and Chapter 13 cases.[112] For example, in *In re Investment Company of the Southwest, Inc.*,[113] the Bankruptcy Court for the District of New Mexico sought to determine the appropriate Chapter 11 cram down interest rate for a bankrupt corporation, formed to purchase, develop, and sell real property.[114] The debtor in that case proposed a seven percent interest rate, calculated using the *Till* formula approach.[115] Although noting that *Till* arose out of a Chapter 13 case, the *Investment Company of the Southwest* court noticed that a phrase in Chapter 13 discussed thoroughly by the *Till* Court—"value, as of the effective date of the plan"—also appears

establishing the formula rate as the preferred rate of the plurality, I will proceed on this assumption. *See, e.g.*, *In re* Prussia Assocs., 322 B.R. 572, 587 (Bankr. E.D. Penn. 2005).

109 *Prussia Assocs*., 322 B.R. at 587.

110 *Till*, 541 U.S. at 480.

111 *See, e.g.*, *In re* MPM Silicones, L.L.C., 531 B.R. 321, 335 (S.D.N.Y. 2015) (affirming that "a risk premium of 1 to 3% is appropriate 'unless there are extreme risks that . . . do not exist here'" (citation omitted)); *see also* Thompson & McDonough, *supra* note 17, at 904–05 ("*Till* eliminated the debate over interest rates in chapter 13 cramdown fights and mandated use of the 'prime-plus' method, a formula approach involving adoption of the prime rate plus a risk variable that typically is, but need not be, within the range of one to three percent."). Given that bankruptcy judges are given the discretion to award a one to three percent risk adjustment based on the individual circumstances of each case, it could be argued that finding the cram down rate risk adjustment is actually a finding of fact. If it were in fact true that the appropriate risk adjustment to the risk-free rate were a finding of fact, the bankruptcy judge's determination of this amount would only be reviewable for clear error on appeal, a highly deferential standard. However, in practice, we often see appellate courts reviewing the choice of methodology to calculate cram down rates, as well as the rate actually decided, reviewed *de novo* on appeal. *See infra* Part III.

112 Commentators disagreed as well. *Compare* Thompson & McDonough, *supra* note 17, *with* Mark G. Stingley et al, *Resolved: The* Till *Rate of Interest is Applicable in Chapter 11 Cases*, 100110 ABI-CLE 245 (2010).

113 No. 11-02-17878 SA, 2004 Bankr. LEXIS 2585 (Bankr. D.N.M. Sept. 28, 2004).

114 *Id.* at *3–4.

115 *Id.* at *8–10.

identically in Chapter 11.[116] Because the testimony of both parties demonstrated that there was no readily available market for the loan at issue, the court decided that the formula approach was the most sensible rate calculation method.[117] The court supported this application with arguments from the *Till* Court in favor of the formula approach that were equally applicable to Chapter 11 cases.[118]

Bankruptcy courts in other circuits, however, were coming to different conclusions. In *Prussia Associates*,[119] the creditor challenged the debtor's proposed plan, arguing that the interest rate should be 9.72%.[120] Assuming that the cram down provisions of Chapter 11 require the use of a market rate of interest, the creditor arrived at this "market rate" by blending the 6.75% interest rate on the senior portion of a replacement loan and the sixteen percent rate on a smaller mezzanine portion of the loan.[121] The debtor, on the other hand, argued for a 6.5% interest rate, reasoning that adherence to a market rate of interest had been rejected by *Till*.[122]

Addressing the creditor's objection that *Till* did not apply in the Chapter 11 context, the court held that *Till* was "instructive," but not "controlling," in a Chapter 11 case.[123] The court then argued that footnote 14 in *Till* served to carve out an exception to using the formula approach where an efficient market exists,[124] obviating the need to apply *Till*.[125] Despite finding that a readily available market existed, the

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116 *Id.* at *8–10 ("*Till* arose out of a chapter 13 case, not a chapter 11 case, but the Supreme Court addressed the meaning of the phrase 'value, as of the effective date of the plan', a phrase which appears repeatedly throughout the Code, especially in chapter 11." (citation omitted)).

117 *Id.* at *10–14.

118 *Id.* at *13.

119 322 B.R. 572 (Bankr. E.D. Pa. 2005).

120 *Id.* at 585.

121 *Id.* A "mezzanine" loan is typically a loan secured by an interest in the company, as opposed to by an asset such as the real property of the business and is subordinate to another loan or debt obligation. *See* Hotel 71 Mezz Lender L.L.C. v. Falor, 14 N.Y.3d 303, 303 n.1 (2010); *see generally* LUC NIJS, MEZZANINE FINANCING: TOOLS, APPLICATIONS AND TOTAL PERFORMANCE 7–10 (2013). In *Prussia Associates*, the debtor company owned a hotel, and the mezzanine loan referenced was an unsecured loan made to the debtor by a different creditor than the one at issue here. 322 B.R. at 576–77. The repayment of this mezzanine loan was expressly subordinated to the one made by the creditor at issue. *Id.* at 577.

122 *Prussia Assocs.*, 322 B.R. at 585.

123 *Id.*

124 Footnote 14 of *Till* states: "[W]hen picking a cramdown rate in a Chapter 11 case, it might make sense to ask what rate an efficient market would produce." Till v. SCS Credit Corp., 541 U.S. 465, 476 n.14 (2004). Other courts have not interpreted this footnote as the *Prussia Associates* court did. For example, in *In re MPM Silicones*, the court noted that "the language in the *Till* footnote [14] certainly does not require the application of the efficient market approach in Chapter 11 proceedings. All the footnote can fairly be read to suggest is that a court may want to consider market rates in the Chapter 11 context." 531 B.R. 321, 333 (S.D.N.Y. 2015). The *MPM Silicones* court applied the *Till* formula approach to a Chapter 11 case without considering evidence of an efficient market. *Id.*

125 *Prussia Assocs.*, 322 B.R. at 589.

evidence for concretely establishing the rate according to that market was lacking, so the court resorted to the *Till* method.[126]

Following the lead of the *Prussia Associates* court, the Sixth Circuit Court of Appeals in *In re American HomePatient, Inc.*[127] "decline[d] to blindly adopt" the formula approach in the Chapter 11 context, and instead, first looked for the existence of an efficient market.[128] However, if a court is confronted with a case where no efficient market exists, the Sixth Circuit directs that court to apply the formula approach.[129] This two-pronged approach to Chapter 11 cram down became known as the "efficient market approach."[130] In *American HomePatient*, the bankruptcy court had relied on the coerced loan approach used in the Sixth Circuit prior to the decision in *Till*.[131] The lenders objected to this approach, arguing that the coerced loan theory was improper in light of *Till*. [132]

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126 *Id.* at 590. The Bankruptcy Court of this district adhered to this method in a later case, using expert testimony of one of the parties to establish the efficient market rate of interest—even while acknowledging that it was a little bit on the low side—and discounting that rate for what the court saw to be an "overly generous assessment" of the benefits of a tax-exemption. *See In re* La Guardia Assocs., No. 04-34512 SR, 2006 Bankr. LEXIS 4735, at *129–30 (Bankr. E.D. Pa. Sept. 13, 2006). Thus, because the court in this later case was able to determine an efficient market existed for the type of loan in question, it held that adherence to the *Till* method was not necessary. *Id.* To determine the rate that derived from this existing market, the court relied on testimony which argued that the existing coupon rates of interest were the appropriate cram down rate of interest. *Id.* at *130. This testimony relied on a data base of over 11,000 institutional-grade commercial mortgage loans to calculate the interest rate as of 2005, and then adjusted that rate for the maturity of the bonds, the specific type of the collateral—a hotel—and the increase in the "benchmark interest rate" because of maturity. *Id.* at *125–26. The speaker then made a downward adjustment for the tax exempt feature of the bonds "based on an assumed income level and tax bracket for a hypothetical New York City resident," which the court believed that the speaker had valued too highly. *Id.* at *126.

127 420 F.3d 559 (6th Cir. 2005).

128 *Id.* at 568.

129 *Id.*

130 *See* Jennis & DiSanto, *infra* note 185. However, the "efficient market" referred to by this approach is the market for DIP, or debtor-in-possession, financing. *See generally* Huebner, *infra* note 178 (discussing debtor-in-possession financing); Wong, *infra* note 179, at 1949–50. It could be argued that this market for DIP financing is not, in fact, efficient, given that the large majority of DIP lenders are also pre-petition lenders of the debtor. *See* PRACTICAL LAW FIN. WITH CONTRIBUTIONS FROM KENNETH STEINBERG & CHRISTOPHER ROBERTSON, KEY DEVELOPMENTS AND TRENDS IN DIP FINANCING 2 (2015), https://www.davispolk.com/sites/default/files/kenstein.chrobert.practical.law_.finance.article.03.24.15.PDF. This is partly due to the lack of unencumbered assets at this stage of bankruptcy to secure the new loan. *Id.* However, this gives the lender advantages in competing for the DIP loan. *Id.* Therefore, one could argue that DIP lending is precisely *not* an efficient market. Instead, the existing lender comes into the DIP financing opportunity with a supreme informational advantage and secures the priority position over all of the pre-petition debt. *Id.* ("The existing secured lender is often the DIP lender . . . [and] improves the priority position of [its] prepetition debt."). Additionally, "[o]ften only a portion of the DIP loan is new money . . . keeping the debtor operating just long enough to liquidate the lenders' collateral." *Id.*

131 *Am. HomePatient, Inc.*, 420 F.3d at 565.

132 *Id.* at 566.

Noticing that an efficient market for the type of loan at issue existed, and that the bankruptcy court below had considered the efficient market for this kind of loan in its calculation using the coerced loan approach rate, the Sixth Circuit affirmed the bankruptcy court's calculation of a 6.785% coerced loan interest rate.[133] Thus, although averring to seek an efficient market rate, the *American HomePatient* court ended up approving a rate yielded by the coerced loan approach, one of the methods explicitly rejected in *Till*.[134]

The interest rate applied to post-default Chapter 11 bankruptcy loans, and the method employed to determine it, has continued to vary among courts. This inconsistency in some of the circuit courts is examined below.

B. *The Second Circuit's Gap-Filling and Hybrid Approaches*

In 2015, the District Court for the Southern District of New York considered *Till*'s applicability to Chapter 11 on appeal.[135] In *In re MPM Silicones*, *L.L.C.*,[136] the creditors argued that the court should use an efficient market approach to determine the cram down interest rate,[137] whereas the debtors contended that the court should apply the *Till* formula approach.[138] The creditor supported its argument with Sixth Circuit case law that applied the *American HomePatient* efficient market approach.[139] The court found that *Till* did not explicitly require use of the formula approach in Chapter 11 proceedings, and thus, the Sixth Circuit was free to fill the gaps of pre-*Till* Sixth Circuit coerced loan method precedent with *Till* ideas.[140] However, the court discussed pre-*Till* opinions where the Second Circuit had rejected a market approach,[141] and held that the Second Circuit would similarly continue

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133 *Id.* at 569 ("Although the lenders argue that the rate chosen by the bankruptcy court was not the rate produced by an efficient market . . . . Its conclusion that the appropriate market rate would be 6.785% was reached only after carefully evaluating the testimony of various expert witnesses. The fact that the bankruptcy court utilized the rubric of the 'coerced loan theory' that was criticized in *Till* provides no basis to reverse the bankruptcy court's decision . . . .").

134 *Id.*

135 *In re* MPM Silicones, L.L.C., 531 B.R. 321 (S.D.N.Y. 2015).

136 *Id.*

137 *Id.* at 332. "Under the efficient market approach, the cramdown interest rate is based on the interest rate the market would pay on such a loan, in this case measured by 'the rates on the exit and bridge financing the Debtors actually obtained.'" *Id.*

138 *Id.*

139 *Id.* at 333 ("The Senior Lien Appellants also point to precedent from other Circuits, such as the Sixth Circuit in *In re American HomePatient* in which courts chose to apply the efficient market rate in the Chapter 11 context." (citation omitted)).

140 *Id.* at 333–34.

141 *Id.* at 333.

to use its pre-*Till* formula approach methodologies, filling in the gaps with *Till* in the same way.[142]

Despite this explicit rejection of the efficient market approach by the Southern District in *MPM Silicones*, another district court within the Second Circuit remanded a case back to the bankruptcy court to determine whether an efficient market existed, and if not, to follow the Sixth Circuit's efficient market approach of applying the *Till* formula method.[143] This approach contrasts starkly from the gap-filling formula approach adopted by the *MPM Silicones* court. As the next section discusses, courts in the Ninth Circuit adopted similarly diverging methodologies.

C. *The Ninth Circuit: Blended or Formula?*

There is a similar methodological inconsistency among Ninth Circuit courts. In *In re Sundance Self Storage-El Dorado LP*,[144] the bankruptcy court began its analysis with footnote 14 in *Till*, and how this footnote has guided some courts confronted with a Chapter 11 bankruptcy reorganization to first look into what rate an efficient market would produce.[145] After determining that no efficient market rate existed for the type of loan in question, the court held that a blended rate calculated by mixing rates from multiple financing products in the market would serve as a good approximation of what rate an efficient market would yield.[146]

However, in *In re Red Mountain Machinery Co.*,[147] a different Ninth Circuit district court drew methodology from diverging Ninth Circuit precedent. In *Red Mountain Machinery Co.*, the appellant

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[142] *Id.* at 334 ("Just as the Sixth Circuit filled the gaps in *Till* using previous Sixth Circuit precedent, this Court must fill those same gaps by reference to Second Circuit precedent."). The earlier Second Circuit case relied on by the *MPM Silicones* court was a Chapter 13 case in which the court argued that the efficient market approach incorrectly put the creditor in the same economic position that it would have been in if it had arranged a new loan, as opposed to putting the creditor "in the same economic position that it would have been in had it received the value of its claim immediately." *Id.* at 333 (quoting *In re* Valenti, 105 F.3d 55, 63 (2d Cir. 1997), *abrogated by* Assocs. Commercial Corp. v. Rash, 520 U.S. 953 (1997)). Interestingly, the Supreme Court in *Till* cites to this Second Circuit case in its analysis of how to calculate a debtor's risk. *See* Till v. SCS Credit Corp., 541 U.S. 465, 480 (2004).

[143] Mercury Capital Corp. v. Milford Conn. Assocs., L.P., 354 B.R. 1, 11 (D. Conn. 2006).

[144] No. 10-36676-D-11, 2012 Bankr. LEXIS 6144 (Bankr. E.D. Cal. Apr. 12, 2012).

[145] *Id.* at *33. See *supra* note 124, for the text of footnote 14 in *Till*.

[146] *Sundance Self-Storage*, 2012 Bankr. LEXIS 6144, at *33. The court drew support for its approach from a Ninth Circuit case decided in 1994 that calculated the cram down interest rate in this way. *Id.* at *33–34. The 1994 case relied upon blending the rate of a seventy percent loan-to-value loan and the rate of a mezzanine financing instrument in order to determine the cram down rate. *Id.* at *34; *see In re* Boulders on the River, Inc., 164 B.R. 99, 105 (B.A.P. 9th Cir. 1994).

[147] 471 B.R. 242 (D. Ariz. 2012).

argued that the formula approach was inappropriate in the Chapter 11 context, and that instead a market rate approach should be used.[148] The court relied on a Ninth Circuit case from the 1990s, which affirmed application of the formula approach to a Chapter 11 case, and the court similarly ruled in favor of this approach.[149] Thus, in the Ninth Circuit, two different courts came to two different holdings regarding the proper Chapter 11 cram down methodology, even though each court relied on Ninth Circuit precedent.[150] As this Note will describe below, these inconsistencies exist in the Eleventh Circuit as well.

D. *The Eleventh Circuit: Sometimes Seeking an Efficient Market*

Similar discrepancies exist among the district courts in the Eleventh Circuit. In *SPCP Group, L.L.C. v. Cypress Creek Assisted Living Residence, Inc.*,[151] the court relied on Eleventh Circuit precedent in adopting the Sixth Circuit's two-pronged efficient market approach.[152] However, in *Vision-Park Properties v. Seaside Engineering & Surveying, Inc.*,[153] another Eleventh Circuit district court ignored the efficient

148 *Red Mountain Mach. Co.*, 471 B.R. at 250.

149 *Id.*; *see In re* Fowler, 903 F.2d 694 (9th Cir. 1990). In yet another district court within the Ninth Circuit, the bankruptcy court's determination of a 9.5% interest rate was examined on appeal. *See* E. W. Bank v. Ravello Landing, L.L.C., No. 2:09-CV-02224-PMP-LRL, 2010 U.S. Dist. LEXIS 101007 (D. Nev. Sept. 7, 2010). The bankruptcy court decided on this rate because it reflected the parties' contractual minimum rate before the debtor filed for bankruptcy and provided an appropriate premium over the prime rate. *Id.* at *11. The District Court remanded the case for further findings, but only because the bankruptcy court failed to consider the plan under the lens of § 1129(b)(2)(A)(1); the court did not criticize the use of a presumptive contract approach in determining the interest rate. *Id.* at *30–34. However, it is important to note that in this case the loan at issue was to be repaid as a lump-sum payment, not as a stream of deferred payments, which has been the type of repayment scheme at issue in the cases discussed thus far. Additionally, a lump-sum payment does not raise the same concerns about adjustment for risk. *See id.* at *31–33. A risk adjustment is made to the interest rate applicable to a stream of *deferred* payments because "[a] debtor's promise of future payments is worth less than an immediate payment of the same total amount because the creditor cannot use the money right away, inflation may cause the value of the dollar to decline before the debtor pays, and there is always some risk of nonpayment." Till v. SCS Credit Corp., 541 U.S. 465, 474 (2004). Thus, many of these concerns are inapplicable to a lump-sum payment.

150 In *Red Mountain Machinery Co.*, a district court within the Ninth Circuit relied on precedent in holding that the formula approach was the proper methodology for determining the Chapter 11 cram down rate. 471 B.R. at 250–51. However, in *Sundance Self-Storage*, decided in another court within the Ninth Circuit, the court held that a blended rate calculated by mixing the rate of multiple financing products in the market would yield the appropriate interest rate in a Chapter 11 cram down case. 2012 Bankr. LEXIS 6144, at *33–34. This case also relied on Ninth Circuit precedent, albeit different precedent, to come to this different holding. *Id.*

151 434 B.R. 650 (M.D. Fla. 2010).

152 *Id.* at 653–60.

153 No. 3:12-cv-511-MW/EMT, 2014 U.S. Dist. LEXIS 41923 (N.D. Fla. Mar. 27, 2014).

market analysis and instead applied the formula approach.[154] Although courts within the Fifth Circuit also have differing views on determining the Chapter 11 cram down rate, the section below will explain the intentionally flexible standard employed in that circuit.

E. *The Fifth Circuit's Factual Inquiry*

In *In re Texas Grand Prairie Hotel Realty, L.L.C.*,[155] although both parties contended that *Till* applied to Chapter 11 cram down proceedings, the debtor's expert derived a five percent interest rate, and the creditor's expert derived an eight percent interest rate.[156] The creditor challenged the district court's formula approach methodology as improper.[157] The Fifth Circuit, however, declined to require a specific method for determining the appropriate cram down interest rate under Chapter 11.[158] The Fifth Circuit posited that analyzing a company's risk of nonpayment involved a particularized factual determination, which required weighing the evidence and testimony of witnesses.[159] The Fifth Circuit stated that the fact finder was best suited to choose the appropriate method, a decision that should not be disturbed without clear error.[160] Thus, bankruptcy judges in the Fifth Circuit can employ the cram down interest rate determination method that best serves the facts of each case.[161] If appealed, the bankruptcy court's entire analysis of the cram down interest rate, including both the methodology employed and the numerical rate calculated, will only be reviewed for clear error.[162]

However, this wide discretion results in an inconsistent application of the law to Chapter 11 bankruptcy cases. For example, in *In re Good*,[163]

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[154] *Id.* at *54–55. The creditor in *Vision-Park Properties* had argued that the formula approach value did not compensate creditors enough to ensure that they receive their present value interest and advocated instead for a floating rate based on the *Wall Street Journal* Prime Rate plus a premium of three percent. *Id.* at *54.

[155] 710 F.3d 324 (5th Cir. 2013).

[156] *Id.* at 327.

[157] *Id.* at 336.

[158] *Id.* at 330 ("We reasoned that it would be imprudent to 'tie the hands of the lower courts as they make the factual determination involved in establishing an appropriate interest rate.'"). The Fifth Circuit has not done the same in the Chapter 13 context, given the greater need to reduce litigation in the case of an individual debtor. *Id.* at 331. However, in the Chapter 11 business context, the Fifth Circuit reviews a bankruptcy court's *entire* cram down rate analysis only for clear error. *Id.*

[159] *Id.*; *see also* Good v. RMR Invs., Inc., 428 B.R. 249, 253–54 (E.D. Tex. 2010).

[160] *Id.*

[161] *See, e.g.*, *Good*, 428 B.R at 255 ("[I]n the Fifth Circuit, bankruptcy courts still enjoy some latitude in determining which method should be applied to determine the cramdown interest rate in Chapter 11 cases.").

[162] *Id.* at 253.

[163] 413 B.R. 552 (Bankr. E.D. Tex. 2009).

a Fifth Circuit district court held that the creditor was entitled to cram down interest at the contractual rate of fifteen percent, reasoning that the debtor was in default of its contractual obligations when it filed for bankruptcy, the debtor was solvent, and the creditor was oversecured.[164]

On the other hand, one year later in *In re SJT Ventures, L.L.C.*,[165] another Fifth Circuit district court recognized that many debtors file for Chapter 11 because they are unable to meet their contractual obligations, and requiring these debtors to repay creditors at the contract interest rate would be detrimental to the success of that company's Chapter 11 reorganization.[166] The *SJT Ventures* court further recognized the impropriety of adopting the formula approach, specifically in the commercial lending context, because of the existence of a readily established efficient market for secured commercial real estate lending.[167] Therefore, the court in *SJT Ventures* calculated a 6.35% cram down interest rate, using the "market formula" employed in the market when creditors give oversecured commercial loans to debtors.[168]

This Note will argue that a uniform approach to cram down interest rate calculation is needed to ensure consistency and predictability in bankruptcy proceeding outcomes,[169] as well as to protect the expectations of lenders and borrowers in the market.[170] This uniformity is best achieved through a "prime-plus-plus" approach that preserves the procedural simplification, low evidentiary costs, and lower interest rates yielded by the formula approach. Additionally, the proposed method would allow creditors to present evidence of an efficient market which would support increasing the prime-plus rate. This diminishes the possibility that a creditor will be undercompensated by the court-derived cram down interest rate.

IV. ANALYSIS: THE "CONTRADICTORY" PORTIONS OF *TILL* THAT RELATE TO CHAPTER 11

Often, a bankruptcy court's analysis of which cram down method to apply begins with a parsing of two seemingly contradictory portions

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164 *Id.* at 559–60 The Supreme Court has defined an "oversecured" claim as one where the property securing the claim is worth more than the value of the claim. *See* U.S. v. Ron Pair Enters., Inc., 489 U.S. 235, 239 (1989). For a discussion on the distinctions between secured, undersecured, and oversecured creditors, see NATHALIE MARTIN & OCEAN TAMA, INSIDE BANKRUPTCY LAW: WHAT MATTERS AND WHY 79–84 (2008).

165 441 B.R. 248 (Bankr. N.D. Tex. 2010).

166 *Id.* at 255.

167 *Id.*

168 *Id.* at 255–56.

169 *See* Alec P. Ostrow, *Chapter 11 Cramdown Interest Rates: The Momentum Tilts Toward Chapter 13*, 2015 NORTON ANN. SURV. BANKR. L. 3 (2015).

170 *See* Wong, *infra* note 179.

of *Till* that relate to Chapter 11.[171] The first portion states that Congress likely intended bankruptcy judges and trustees[172] to follow "essentially the same approach" when choosing an appropriate interest rate, regardless of the chapter.[173] This "same approach" statement has led many courts to deduce that one method of cram down interest rate determination should apply uniformly to Chapter 11 and Chapter 13 cases.[174] It has also led some bankruptcy courts to hold that *Till* controls in Chapter 11 and Chapter 13 cases, with the prime-plus formula approach serving as the default interest rate calculation method.[175]

However, this "same approach" statement diverges from the Court's reasoning in another footnote. In this second footnote, the Court distinguishes Chapter 11 cram down from Chapter 13,[176] by acknowledging a market of creditors willing to lend to Chapter 11 debtors who retain possession of the collateral securing their loan.[177]

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171 *See, e.g.*, *In re* MPM Silicones, L.L.C., 531 B.R. 321, 333 (S.D.N.Y. 2015); SPCP Grp., L.L.C. v. Cypress Creek Assisted Living Residence, Inc., 434 B.R. 650, 654 (M.D. Fla. 2010); *see also* Thompson & McDonough, *supra* note 17, at 908–09.

172 A court-appointed bankruptcy trustee identifies and holds title to the debtor's non-exempted property in a Chapter 7 liquidation bankruptcy proceeding. *See* JAMES JOHN JURINSKI, BANKRUPTCY STEP-BY-STEP 35 (2d ed. 2003). Since bankruptcy trustees exist only in the Chapter 7 context, this sentence by the *Till* court can strongly be read as arguing that Congress intended proceedings under all bankruptcy code chapters to follow the same approach.

173 Till v. SCS Credit Corp., 541 U.S. 465, 474 (2004) ("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."). "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." Thompson & McDonough, *supra* note 17, at 919.

174 *MPM Silicones*, 531 B.R. at 333; *see also supra* note 173.

175 *See, e.g.*, Vision-Park Properties v. Seaside Eng'g & Surveying, Inc., No. 3:12-cv-511-MW/EMT, 2014 U.S. Dist. LEXIS 41923, at *54 (N.D. Fla. Mar. 27, 2014); *In re* Red Mountain Mach. Co., 471 B.R. 242, 251 (D. Ariz. 2012) (agreeing with the bankruptcy court that *Till* intended the formula approach to apply in both the Chapter 13 and the Chapter 11 context, save for an exception when an efficient market is available, an exception that did not apply in the case at hand).

176 *Till*, 541 U.S. at 476 n.14 ("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. 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." (citation omitted)).

177 *See supra* note 176; *see, e.g.*, *Quiksilver Gets $175 million DIP Financing Approval*, L.A. BIZ (Oct. 16, 2015, 11:57 AM), http://www.bizjournals.com/losangeles/news/2015/10/16/quiksilver-gets-175-million-dip-financing.html; Peter Hall, *Haggen Gets $215M Interim DIP Financing Approved*, LAW360 (Sept. 10, 2015, 10:31 PM), http://www.law360.com/articles/701670/haggen-gets-215m-interim-dip-financing-approved.

This practice is called "debtor-in-possession" financing.[178] Thus, the Court recommends that bankruptcy courts inquire what rate an "efficient market" would produce in Chapter 11 cases.[179] However, the Court points out the absence of a similar market for Chapter 13 debtors.[180] A dearth of lenders willing to finance Chapter 13 debtors means that there will be no ready market to influence the cram down rate analysis in that chapter.[181] Without this market, a bankruptcy court in Chapter 13 need only consider what rate would fairly compensate the creditor for its risk in lending to a bankrupt borrower, as well as for the delay in repayment.[182] This footnote has led some courts to decline to apply *Till* in the Chapter 11 context.[183] Alas, while the *Till* plurality directs bankruptcy courts to treat all cram down proceedings similarly, it simultaneously points out an additional consideration, which distinguishes Chapter 11 from Chapter 13.

The varying approaches dictated by these two provisions is what led to the creation of the Sixth Circuit's efficient market approach.[184] This approach requires bankruptcy courts in Chapter 11 cases to first look for the existence of an efficient market.[185] If either party adduces sufficient evidence of such a market, then the bankruptcy court is permitted to select the interest rate yielded by that market as the cram down rate.[186] If, however, the court is unable to find conclusive evidence of an efficient market, the court is instructed to apply the *Till* formula approach.[187] Generally, a market is "efficient" if there are other readily

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178 For a discussion of debtor-in-possession financing, see Marshall S. Huebner, *Debtor-in-Possession Financing*, RMA J. 30 (Apr. 2005), http://www.davispolk.com/sites/default/files/files/Publication/48334111-be66-424d-917b-368894b495cf/Preview/PublicationAttachment/acd1d2f6-4351-4874-bd30-3d2f4d2b5056/huebner.dip.article.2005.revised.pdf; *see also* BAGBY, *supra* note 78.

179 *Till*, 541 U.S. at 476 n.14; *see also* Daniel R. Wong, Note, *Chapter 11 Bankruptcy and Cramdowns: Adopting a Contract Rate Approach*, 106 NW. U. L. REV. 1927, 1949–53 (2012).

180 *See supra* note 176.

181 *Till*, 541 U.S. at 476 n.14.

182 *Id.*

183 *See, e.g.*, Good v. RMR Invs., Inc., 428 B.R. 249, 255 (E.D. Tex. 2010); *In re* N. Valley Mall, L.L.C., No. 8:09-bk-19346-TA, 2010 WL 2632017 (Bankr. C.D. Cal. June 21, 2010); *In re* DBSD N. Am., Inc., 419 B.R. 179 (Bankr. S.D.N.Y. 2009), *aff'd*, No. 90-13061(REG), 2010 WL 1223109 (S.D.N.Y. 2010); *In re* Good, 413 B.R. 552 (Bankr. E.D. Tex. 2009); *In re* Dargahi, No. SV 03-15884-KT, 2008 WL 618954 (Bankr. D.C. Cal. Mar. 3, 2008); *In re* Valencia Flour Mill, Ltd., 348 B.R. 573 (Bankr. D.N.M. 2006).

184 *See In re* Am. HomePatient, Inc., 420 F.3d 559, 568 (6th Cir. 2005); *see also supra* Section III.A.

185 *Am. HomePatient*, 420 F.3d at 568; *see, e.g.*, Mercury Capital Corp. v. Milford Conn. Assocs., 354 B.R. 1 (D. Conn. 2006) (remanding the bankruptcy court's use of the formula approach and directing the bankruptcy court to first determine whether an efficient market exists); *see generally* David S. Jennis & Kathleen L. DiSanto, *How Efficient Is Your Market?*, 32 AM. BANKR. INST. J. 44 (2013).

186 *See supra* note 185.

187 *Am. HomePatient*, 420 F.3d at 568; *see, e.g.*, *In re* Cantwell, 336 B.R. 688 (Bankr. D.N.J. 2006) (employing the *Till* formula approach of adding a one percent risk premium to the

discernable loans with a term, size, and collateral comparable to the cram down loan at issue.[188]

Under the efficient market approach, two similar businesses filing nearly identical Chapter 11 plans could be assigned two very different cram down interest rates, with one court relying on the efficient market rate, and another using the formula approach.[189] Accordingly, this Note will instead propose that the two "contradictory" provisions in *Till* are in fact not contradictory, and that together they can result in a *prime-plus-plus* approach that courts can uniformly apply to Chapter 11 cram down proceedings.

V. PROPOSAL

A. *Introducing the Prime-Plus-Plus Approach: An Efficient Prime-Plus Rate*

Despite the confusion that these two seemingly contradictory statements from *Till* have caused bankruptcy judges for over a decade, these two statements can be reconciled to provide a unified approach to cram down interest rate determination. This method takes the form of a "prime-plus-plus" approach. In light of the Supreme Court's recommendation that cram down interest rates be determined similarly under different chapters of the Code,[190] this approach also begins with the "prime rate." As the rate which banks claim that they charge when lending to their most creditworthy borrower, this rate is often used as the starting benchmark for commercial lending.[191] Then, like *Till*'s formula "prime-plus" approach, the bankruptcy court should determine an appropriate risk adjustment based on the factors enumerated in *Till*.[192] In addition to these factors, however, under the "prime-plus-

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national prime rate when there was insufficient evidence in the record to establish an efficient market rate).

188 *In re* Tex. Grand Prairie Hotel Realty, L.L.C., 710 F.3d 324, 337 (5th Cir. 2013) ("[M]ost [courts] have held that markets for exit financing are 'efficient' only if they offer a loan with a term, size, and collateral comparable to the forced loan contemplated under the cramdown plan."). An example of this can be seen in *In re* Winn-Dixie Stores, Inc., 356 B.R. 239, 256 (M.D. Fla. 2006), where the court approved the debtor's proposed interest rate of seven percent supported by evidence of fourteen proposals for exit financing they obtained from other lenders in the market, a process which the court found was "an efficient test of the market."

189 *See, e.g.*, *infra* Section V.B.

190 Till v. SCS Credit Corp., 541 U.S. 465, 474 (2004).

191 *See* Balakrishnan, *supra* note 94. This need for protection from higher interest rates stems from one of the goals of Chapter 11 bankruptcy: to provide a fresh start for the bankrupt debtor. *See infra* note 230.

192 *Till*, 541 U.S. at 479 ("The appropriate size of that risk adjustment depends, of course, on such factors as the circumstances of the estate, the nature of the security, and the duration and

plus" approach, the bankruptcy court should also consider evidence demonstrating the existence of an efficient market. Instead of adopting the market rate at face value like in the efficient market approach, the existence of this market is simply one factor for bankruptcy judges to consider when adjusting the prime rate upward for risk. Therefore, the proposed "prime-plus-plus" method includes consideration of the rate that an efficient market would produce, but does so within the context of a risk premium adjustment to the prime rate.

By providing creditors with an opportunity to demonstrate that an efficient market exists that employs a higher rate, the risk that a creditor will be undercompensated by the bankruptcy court's determination is lessened.[193] Alternatively, by making this adjustment part of the risk premium endorsed in *Till*, as opposed to solely applying this rate at face value, the debtor has some protection from the higher interest rates that occur in the riskier debtor-in-possession financing market.[194] Like the *Till* formula approach, by starting with a presumptively low rate, the burden of evidentiary proof shifts to the corporate creditors, who likely have better access to information about the market than the individual debtor, to raise the rate.[195]

This approach also accords with the *Till* Court's assertion that Congress would favor an approach that is familiar to the financial community, and which "minimizes the need for expensive evidentiary proceedings."[196] By beginning with the commercial lending benchmark and adjusting upward for risk and market evidence, courts would mimic the process of commercial lending itself.[197] Additionally, use of this method will reduce evidentiary costs because both parties will begin their assessment of cram down with this single base rate, and they need only produce evidence on the risk adjustment, as opposed to each party attempting to demonstrate the applicability of two wholly different methods.

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feasibility of the reorganization plan."). It is true that in many Chapter 11 cases, the debtors are big corporations just like the creditors, so these debtors might have equal access to market rates. However, as discussed *supra* in note 44, individuals are also permitted to file for Chapter 11, and so this is not always the case.

193 *Till*, 541 U.S. at 491–92 (Scalia, J., dissenting) (arguing that the formula approach will systematically undercompensate secured creditors for the risk of default); *see also* Elson, *supra* note 15, at 1946 (arguing that starting with the presumptively low interest rate of the *Till* prime-plus approach "overvalues the going concern value" of a bankrupt business).

194 Debtor-in-possession financing is considered "riskier," and thus often results in inflated rates, because this lending occurs in the early stages of a debtor's bankruptcy proceedings, as opposed to cram down, which occurs when a court-supervised bankruptcy reorganization plan is being approved. *See infra* Section VI.A.

195 *Till*, 541 U.S. at 479.

196 *Id.* at 474–75.

197 *See id.* at 479 ("Taking its cue from ordinary lending practices, the [prime-plus] approach begins by looking to the national prime rate . . . . the approach then requires a bankruptcy court to adjust the prime rate accordingly." (footnote omitted)).

In fact, one of the reasons given by the *Till* Court for endorsing the formula approach was that the resulting "prime-plus" rate depends only on the circumstances of the bankruptcy estate, the characteristics of the loan, *and on the state of financial markets.*[198] Thus, it appears that even the *Till* Court contemplated using evidence of financial markets when calculating the cram down interest rate. Accordingly, the "prime-plus-plus" method provides bankruptcy courts with a uniform starting point for cram down interest rate determination, while also allowing for a case-by-case adjustment if the market requires a higher rate.

B. *Applying the Prime-Plus-Plus Formula*

The ability of the "prime-plus-plus" formula to predictably apply to Chapter 11 cram down proceedings can be seen in its application to case law. In *In re Walkabout Creek Limited Dividend Housing Association*,[199] the debtors were owners of low-income apartment complexes.[200] The purchase of the complexes was financed through loans from the Michigan State Housing Development Authority.[201] Using the Sixth Circuit's efficient market approach,[202] the court first determined that the evidence was insufficient to establish an efficient market rate for loans to multi-family housing projects.[203] As mandated by the efficient market approach, the court next turned to the *Till* formula approach, only to discover that the prime rate was too low of a starting point.[204] Although *Till* held that transaction costs are an inappropriate consideration in determining the interest rate, the cost of monitoring the type of loan at issue was significant, and the interest rate had to be adjusted to reflect this expense.[205] After extensively criticizing *Till*'s lack of guidance in

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198 *Till*, 541 U.S. at 479 ("Moreover, the resulting 'prime-plus' rate of 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.").

199 460 B.R. 567 (Bankr. D.C. 2011).

200 *Id.* at 569.

201 *Id.*

202 *See supra* Sections III.A, IV.A (describing the Sixth Circuit's efficient market approach).

203 *Walkabout Creek*, 460 B.R. at 574.

204 *Id.* The court came to this determination by first noting that the prime rate represents the "interest rate that a commercial bank holds out as its lowest rate for a short-term loan to its most creditworthy borrowers." *Id.* (citing *Prime Rate*, BLACK'S LAW DICTIONARY (9th ed. 2009)). The court distinguished *Till*, which dealt with the cram down of car loan payments to be made over three years, to the loan at hand, which sought to re-amortize the loans over a period of thirty-five years. *Id.* Because this type of loan represented a "greater inflationary risk than the prime rate account[ed] for," the court determined that the prime rate was too low of a starting point. *Id.*

205 *Id.* at 575.

determining a risk premium,[206] the court substituted the thirty-year treasury bond rate as the prime rate, adjusting upward one percent, to find that the lower interest rate proposed by the debtor should be denied.[207] This case demonstrates the inadequacies of mandating use of the efficient market approach: without an efficient market to provide the proper interest rate on its own, the court is forced to resort to the formula approach, which will not permit adjustment for the higher monitoring rates required by this type of loan in the market.

If the *Walkabout Creek* court would have instead used the "prime-plus-plus" method, it would have been able to adjust the cram down interest rate for monitoring costs; an adjustment not possible with the *Till* formula approach. Thus, the "prime-plus-plus" method ensures that the bankruptcy judge calculates a cram down interest rate that best suits the debtor and loan-specific characteristics of each case, including the market in which that debtor exists.

Application of the "prime-plus-plus" method also ensures that factually similar cases are treated uniformly by federal bankruptcy courts. In *Prussia Associates*,[208] the debtor hotel-operator sought to cram down a 17.5 million dollar loan on its creditor.[209] The loan was secured by a first mortgage on the hotel.[210] The mortgage provided for a variable rate of interest that fluctuated between eight and seventeen percent.[211] The creditor proposed a market rate of interest, calculated by blending the 6.75% interest rate on a senior portion of the loan and the sixteen percent interest rate on a smaller mezzanine portion of the loan, resulting in a market-based interest rate of 9.72%.[212] The debtor, on the other hand, argued that *Till* controlled, and that the 4.5% prime rate should be increased by two percent, resulting in a cram down interest rate of 6.5%.[213] Despite agreement between the parties that there was a high demand for hotel investments, and that a readily available financing market existed, the diverging testimony of the two parties rendered the court unable to concretely rely on the "market rate" alone to establish the interest rate.[214] Instead, the court applied the *Till* formula approach, arriving at a rate of 7.25%.[215]

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206 *Id.* at 578.

207 *Id.*

208 322 B.R. 572 (E.D. Penn. 2005).

209 *Id.* at 576.

210 *Id.*

211 *Id.*

212 *Id.* at 584. For a discussion on mezzanine loans and how they function in commercial financing, see sources cited *supra* note 121.

213 *Prussia Assocs.*, 322 B.R. at 590.

214 *See id.* at 589.

215 *Id.* at 591. The prime rate on the day of the hearing was 5.75%, and the court increased this rate by 1.5% for risk. *Id.* The court declined to increase the rate higher because the evidence indicated that "the Debtor's operations are improving apace, and that the value of [the

Conversely, in *In re T-H New Orleans Limited Partnership*,[216] the creditor had a 13.7 million dollar claim against the hotel-owner debtor.[217] The bond financing documents for this loan provided for an 11.5% interest rate, with the hotel serving as the loan's collateral.[218] The debtor proposed an 8.45% cram down interest rate, determined by adding 210 basis points to the two-year U.S. Treasury interest rate.[219] The lender, on the other hand, proposed an interest rate of 13.6%, calculated by breaking down the loan into components and fixing a rate dependent upon how much debt service would be available for each component.[220] However, the *T-H New Orleans* court found that the creditor's interest rate was too high, since the value of the hotel would increase in coming years, and that the debtor's interest rate was too low to compensate the creditor for not receiving its money on the plan's effective date.[221] Therefore, the court affirmed the 11.5% contract interest rate as the cram down rate,[222] a rate almost double that set by the *Prussia Associates* court and calculated using a completely different method.

Applying the prime-plus-plus formula to these two cases would avoid this inconsistency. Each court would have started with the prime rate on the day of confirmation, and then augmented this rate for the risk of nonpayment, as well as any adjustment for demonstrable lending market rates in the hotel industry. Thus, in addition to providing for uniformity in how Chapter 11 cram down rates are calculated, the prime-plus-plus method allows the unique factual circumstance of each debtor to be considered, including the market in which that debtor exists.

Creditor's] collateral is appreciating steadily. The Court thus views the risks attendant to the proposed loan as neither negligible nor extreme." *Id.*

216 116 F.3d 790 (5th Cir. 1997).

217 *Id.* at 795.

218 *Id.* at 800.

219 *Id.* at 800 n.11. "[O]ne basis point is equal to one one-hundredth of a percentage point[.]" Simon Constable, *What Is a Basis Point and Why Is It So Important?*, WALL STREET J. (Sept. 4, 2013, 4:01 PM) http://www.wsj.com/articles/SB10001424127887324823804579017141254359828?mg=id-wsj. Although a seemingly insignificant number, "[b]asis points can add up to a lot of money for both individual investors and institutions." *Id.*

220 *T-H New Orleans*, 116 F.3d at 800 n.12. Debt service is comprised of principal and interest payment expenditures on debt. *See* PAUL M. FISCHER ET AL., FUNDAMENTALS OF ADVANCED ACCOUNTING 503 (2008).

221 *T-H New Orleans*, 116 F.3d at 800.

222 *Id.* at 801.

C. *Counterarguments*

It could be argued that the "prime-plus-plus" method imposes high evidentiary costs on lenders to prove the existence of an efficient market, while also limiting the way this evidence can increase the rate. However, the *Till* Court accepted that minimized evidentiary costs would be achieved through limiting the evidence to that needed to establish the appropriate risk adjustment.[223] Additionally, under the "prime-plus-plus" approach, the creditor need not conclusively establish the *rate* that would be yielded by the market, but only that a market exists which supports an upward adjustment on top of the risk premium described in *Till*. Thus, the "prime-plus-plus" method will produce *less* evidentiary costs for creditors because demonstrating that an efficient market with higher rates exists is a simpler task than demonstrating exactly what that rate is, as is required under the efficient market approach.

On the other hand, it could be argued that by including evidence of an efficient market when calculating the cram down interest rate, courts would include items specifically rejected by the *Till* Court, namely, "lenders' transaction costs and overall profits."[224] However, limiting this evidence to just one factor for calculating risk premium ensures that its influence is balanced among and considered with the same influence as the enumerated *Till* factors: "the circumstances of the estate, the nature of the security, and the duration and feasibility of the reorganization plan."[225] For example, in *In re Texas Grand Prairie Hotel Realty*,[226] the court rejected the creditor's "market-influenced" adjustment to the prime rate because the debtor was committed to his business, maintained well-managed properties, and exceeded projections for revenues in the months prior to the hearing.[227] Additionally, the collateral securing the creditor's loan was "stable or appreciating," and

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223 Till v. SCS Credit Corp., 541 U.S. 465, 479 (2004). Additionally, the *Till* Court noted that the very nature of cram down is not to provide the creditor with a brand new loan that it could obtain in the market place, and "[i]ndeed, the very idea of a 'cramdown' loan *precludes* [this] . . . result: By definition, a creditor forced to accept such a loan would prefer instead to foreclose." *Id.* at 476. Thus, although not compensating a creditor to the full rate that it would obtain in seeking a new loan on the market, the "prime-plus-plus" seeks to adequately compensate creditors for the time value of their money, without considering the "creditor's individual circumstances, such as its prebankruptcy dealings with the debtor or the alternative loans it could make if permitted to foreclose," but instead by permitting an upward adjustment if market evidence shows that the prime-plus rate is significantly undercompensating the creditor for this type of loan. *Id.* at 476–77.

224 *Till*, 541 U.S. at 477; *see also In re* MPM Silicones, L.L.C., 531 B.R. 321, 332 (S.D.N.Y. 2015).

225 *Till*, 541 U.S. at 479.

226 710 F.3d 324 (5th Cir. 2013).

227 *Id.* at 334–35.

the reorganization plan was "feasible."[228] Thus, the traditional *Till* risk premium adjustment factors would remain in the "prime-plus-plus" risk adjustment to prevent overly burdensome upward adjustments.

VI. WHY NOT THE OTHER CRAM DOWN METHODS?

A. *The Efficient Market Approach Does Not Implement the Fundamental Goals of Chapter 11*

It is important that federal bankruptcy courts employ one single method of cram down interest rate determination to ensure uniform application of the law and to protect the expectations of market participants.[229] At the same time, the prescribed method must comport with the fundamental goals of Chapter 11 bankruptcy: to provide a "fresh start" for the business, and to allocate the business's assets so as to protect the rights of creditors.[230] In this Section, this Note will argue that the efficient market approach fails to serve these goals effectively.

A proponent of the efficient market approach might argue that this method best protects creditors. This protection derives from the opportunity to demonstrate that an efficient market of debtor-in-possession financing exists, and therefore, the opportunity to obtain a higher interest rate based on that market. Alternatively, this proponent might argue that debtors get this "fresh start" through protection from expensive evidentiary proceedings, since the burden is on the creditor to prove the existence of an efficient market.[231] If a creditor is unable to conclusively establish that an efficient market exists, then the bankruptcy court will resort to the formula approach,[232] shielding the debtor from unfairly high interest rates.[233] However, this is an unreliable way of combining two separate approaches that does not implement the goals of Chapter 11 bankruptcy, nor provide uniformity in the courts.

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228 *Id.*

229 *Till*, 541 U.S. at 477 ("[T]he court should aim to treat similarly situated creditors similarly."); *see also MPM Silicones*, 531 B.R. at 333.

230 *See In re* Butcher, 189 B.R. 357, 372 (Bankr. D. Md. 1995) ("One of the primary goals of the bankruptcy laws is to provide the rehabilitated debtor emerging from the bankruptcy process with a 'fresh start.'"); *see also* Elson, *supra* note 15, at 1944. *Compare id.*, *with* Wong, *supra* note 179, at 1955 ("The fundamental goals of Chapter 11 bankruptcies are to provide a fresh start and to protect the rights of creditors.").

231 *See, e.g.*, *In re* Griswold Bldg., L.L.C., 420 B.R. 666, 693 (Bankr. E.D. Mich. 2009).

232 *Id.*; *see also supra* Part IV; sources cited *supra* note 185 (describing the efficient market approach's two step process).

233 *Till*, 541 U.S. at 480–81 (noting that the prime-plus result's focus on selecting a rate "high enough to compensate the creditor for its risk but not so high as to doom the plan" protects the debtor from "eye-popping" interest rates).

The first prong of the efficient market approach conflicts with the first goal of Chapter 11 bankruptcy: to grant the debtor a "fresh start."[234] By recommending that bankruptcy courts look to the market for debtor-in-possession financing, the *Till* Court fails to differentiate debtor-in-possession financing and cram down rates, and how they function differently in bankruptcy proceedings.[235] Debtor-in-possession financing generally occurs at the beginning of the bankruptcy case[236] and results in high interest rates because of the risk taken by a creditor in lending to a debtor entering bankruptcy.[237] On the other hand, in cram down, the bankruptcy proceedings have reached the confirmation stage, where a court-supervised reorganization plan is being approved.[238] Lending to this restructured and stable debtor at the cram down stage entails less risk than lending to a newly bankrupt debtor-in-possession.[239] Thus, directing courts to rely on a market rate derived from the latter, more risky, interest rates results in selection of a rate too high for the more stable, and less risky, debtor in cram down.

Additionally, the second prong of the efficient market approach—resorting to the formula approach—has been critiqued for yielding a rate that undercompensates creditors.[240] This conflicts with the second fundamental goal of Chapter 11 bankruptcy: to protect the rights of creditors.[241] Bankruptcy courts that set new, and drastically lower, interest rates than parties bargained for, without considering any evidence of market rates, distorts the greater lending market.[242] Lenders,

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234 *See Butcher*, 189 B.R. at 372.

235 *See* Wong, *supra* note 179, at 1951; *see also* George W. Kuney, *Hijacking Chapter 11*, 21 EMORY BANKR. DEV. J. 19, 49–60 (2006) (describing the process and structure of debtor-in-possession financing, as well as the lack of control by courts in the process); *see generally* sources cited *supra* note 178 (discussing and giving examples of the debtor-in-possession financing market).

236 *See* Kuney, *supra* note 235, at 49.

237 *See* Wong, *supra* note 179, at 1950–51.

238 *Id.* at 1951; *see also Till*, 541 U.S. at 475 ("On the one hand, the fact of the bankruptcy establishes that the debtor is overextended and thus poses a significant risk of default; on the other hand, the postbankruptcy obligor is no longer the individual debtor but the court-supervised estate, and the risk of default is thus somewhat reduced."). Additionally, for a bankruptcy to reach the confirmation stage, the court has already decided that § 1129(a) has been met, indicating that the court thinks the environment is less risky than it was during the pendency of the proceeding. *See* 11 U.S.C. § 1129(a)(11) (2012).

239 *See* Wong, *supra* note 179, at 1951.

240 *See, e.g.*, *Till*, 541 U.S. at 492 (Scalia, J., dissenting) (arguing that the prime-plus formula approach "will systematically undercompensate secured creditors for the true risks of default"); *see also* David Griffiths, *Momentous Decision in Momentive Performance Materials: Cramdown of Secured Creditors–Part II*, WEIL, GOTSHAL & MANGES: BANKR. BLOG (Sept. 10, 2014), http://business-finance-restructuring.weil.com/chapter-11-plans/momentous-decision-in-momentive-performance-materials-cramdown-of-secured-creditors-part-ii/.

241 Wong, *supra* note 179, at 1955. One might notice that the second goal of bankruptcy might seem contradictory to the first goal of bankruptcy as well.

242 Wong, *supra* note 179, at 1954.

afraid of the possibility of being undercompensated, may become wary of lending to riskier borrowers,[243] or may decline to do so unless compensated by an eye-popping interest rate.

Accordingly, the adoption of one method of cram down interest rate calculation among the federal courts protects the expectations of lenders when lending[244] and provides guidance for how they should structure their transactions. Additionally, the "prime-plus-plus" method would protect debtors from exorbitant interest rates by defining and limiting the ability of creditors to upwardly adjust the rate.[245]

B. *The Presumptive Contract Approach Does Not Account for the Changed Circumstances of the Parties in Bankruptcy*

Other commentators have argued that this uniformity would best be served through adoption of the presumptive contract approach.[246] Under the efficient market or formula approach, the reasoning goes, lenders in the regular course of business can be held to an entirely new, and potentially detrimental, court-created interest rate, destroying the understood obligations of the parties to the contract and rendering moot any previous efforts to conform conduct to contract terms.[247] Additionally, the contract rate approach provides a straightforward and objective means for a bankruptcy judge to determine the actual risk of debtor default as measured by the contracting parties, obviating any concern of a largely speculative judicially determined risk premium.[248]

However, the very language of the Code requires some reference to the market.[249] Accordingly, the contractual rate can be chosen if, and only if, it is a proxy for the market rate. In fact, the debtor was a different sort of entity when it negotiated the historic contract.

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243 *Id.* at 1955.

244 *Id.* at 1954.

245 *See In re* SJT Ventures, L.L.C., 441 B.R. 248, 255 (Bankr. N.D. Tex. 2010) (recognizing that debtors file for Chapter 11 bankruptcy because they are unable to meet their contractual obligations, and that requiring them to repay at this rate would be detrimental to the success of the business's reorganization).

246 *See* Elson, *supra* note 15, at 1946–47 (arguing that the presumptive contract rate approach best serves the goals of Chapter 11 bankruptcy); *see also* Wong, *supra* note 179 (arguing for the contract rate approach). In his comment, Wong argues for a contract approach which differs from the presumptive contract approach in that the parties do not have the opportunity to rebut the contract rate: it is simply the rate applied. *Id.* at 1953. However, his arguments apply in favor of adopting the presumptive contract approach as well, the method discussed at length in Section II.C.

247 *Id.* at 1954–55. Wong argues that this failure to respect the parties' expectations can have a "ripple effect" in the borrowing and lending market. *Id.*

248 *Id.* at 1956.

249 *See, e.g.*, 11 U.S.C. § 522(a)(2) (2012) (in this section, "'value' means fair market value as of the date of the filing of the petition").

Therefore, selection of the contract rate without inquiry into whether this rate actually serves as a proxy for the market violates the Code. In order to comport with the Code, a bankruptcy judge who wishes to use the contract rate must make some accompanying market investigation.

CONCLUSION

Because of the potential result that different cram down interest rate determination methods could be applied to two factually similar cases, the efficient market approach fails to ensure consistent application of the law. Moreover, because it does nothing more than maintain the already failed status quo, the presumptive contract approach does not adequately further the goals of Chapter 11 bankruptcy.

Uniform adoption of the "prime-plus-plus" method in federal bankruptcy courts would preserve procedural simplification, incur low evidentiary costs to parties, and yield lower interest rates imperative to the successful reorganization of a bankrupt business. The "prime-plus-plus" method allows for the predictable calculation of post-petition cram down interest rates, while permitting consideration of evidence that supports increasing the cram down interest rate. Thus, the "prime-plus-plus" method avoids the risk that creditors are severely undercompensated, while protecting debtors in their efforts to reorganize and satisfy their financial obligations.