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Feature

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Their Voices Boomed Un-*Till* We Could Hear Them No More

Oyez, Oyez, Oyez. The giants on the hill had been summoned to quell our bickering, and so their voices boomed across the lands. Yet we could not hear their message clearly or perhaps we did not hear it at all. At first we thought we may have understood, yet those of us who had stood as one to listen had heard distinctly different tales. As the giants retreated, they left behind a trove of pages divided into three. For the giants did not speak in unison, and so our bickering began again.

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Since the Supreme Court's holding in *Till*, the commonplace notion is that *Till* requires the use of the "prime-plus" formula approach when determining the cramdown interest rate. However, the authors of this article believe that because there was no majority opinion in *Till*, the proper approach to determining the cramdown interest rate remains in the hands of various circuit courts around the nation.

For those caught in the debate of the appropriate rate of interest in a cramdown case, the argument started long before the giants were consulted in 2004.[1] Prior to *Till*, many questions arose around the nation in both consumer and commercial reorganization cases, and various methodologies and opinions were utilized and argued. *Till* presented some of those questions to the U.S. Supreme Court. The parties in *Till* sought to know whether the secured creditor was entitled to the indubitable equivalent of its pre-petition loan's interest rate, if the loan's contract rate should be used as the presumptive rate, and what a creditor should be compensated for within its interest rate.

The Supreme Court answered with three distinct opinions. Justice John Paul Stevens wrote the plurality opinion and was joined by three other justices.[2] Justice Antonin Scalia dissented and was joined by three other justices.[3] Justice Clarence Thomas concurred with the result but not the reasoning of Justice Stevens. Therefore, his concurrence created the oddity of a plurality decision, since no single opinion could explain the reasoning of the majority of the justices.

Plurality: A Lack of Harmony in *Till*

When no single opinion reflects the majority view, we look within the various opinions to find the reasoning and conclusions that the opinions have in common. Only where the reasoning is in majority do we have an opinion to rely upon. As is common with plurality opinions, understanding and interpreting a Supreme Court's plurality gives rise to several unique — some correct, some incorrect — interpretations of the opinions among practitioners. *Till* is certainly no exception.

There is no doubt that the Court's issuance of multiple nonconcurring or partially concurring decisions has left many practitioners scratching their heads and trying to figure out what portions of the opinions were binding and what were mere *dicta*. While the issuance of concurring opinions and the related *dicta* can greatly increase our understanding of the Court's views and rationale, it can also lead to more confusion because these opinions often lack clear direction on important issues.

Untangling plurality opinions can be a difficult task, leaving everyone uncertain as to a case's actual precedential value. Although plurality decisions remain a source of confusion, the Supreme Court attempted to provide guidance in 1977 in *Marks v. United States*[4]: "When a fragmented Court decides

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

2 Justices David Souter, Ruth Bader Ginsburg and Stephen Breyer.

3 Justices William Rehnquist, Sandra Day O'Connor and Anthony Kennedy.

4 430 U.S. 188 (1977).

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a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"[5] Simply put, lower courts must examine all of the concurring opinions that form the majority ruling on each issue raised, then determine the narrowest, most restrictive commonality among those opinions. Only the portions of the opinions that "overlap" are binding on the lower courts, and the remainder becomes *dicta* with no precedential value.

Although *Marks* added clarity on interpreting Supreme Court plurality decisions, uncertainty still exists, as the Court often issues opinions with little or no effort to clarify their agreements and disagreements. This leaves it to practitioners and lower courts to wade through the myriad thoughts provided in their opinions.

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The Three Melodies in *Till*

Till started in bankruptcy court as a chapter 13 plan that crammed down on the secured lender an interest rate accounting for, among other things, inflation costs and the risk of nonpayment posed by the borrowers. The result was that the plan's rate was much lower than the parties' pre-petition contract rate.[6] The secured creditor appealed, and the district court reversed, relying on evidence that a "subprime" lender could make new loans at a much higher interest rate. The debtors appealed, and the Seventh Circuit endorsed a modified version of the district court's approach. Upon further appeal, the Supreme Court granted *certiorari*.

In 2004, Justice Stevens announced the ruling of the Supreme Court, which was accompanied by the three opinions authored by Justices Stevens, Thomas, and Scalia. Because Justice Thomas concurred with the result, but not the reasoning, of Justice Stevens's opinion, the Seventh Circuit's decision was reversed and Justice Scalia's opinion, which was fairly consistent with the goals of Justice Stevens, simply became another interesting dissent.

Justice Stevens supported the "prime-plus" formula approach to determining interest rates. The rate, Justice Stevens noted, begins with the prime rate and includes such factors as "opportunity costs of the loan, the risk of inflation, and the relatively slight risk of default."[7] Justice Scalia disagreed only with Justice Stevens's use of the prime-plus formula approach to compute cramdown interest rates because Justice Scalia believed that this approach would "systematically undercompensate secured creditors for the true risks of default."[8] Instead, Justice Scalia advocated for using the contract interest rate absent any other evidence that such rate is too high.

Both Justices Stevens and Scalia cite their belief that the cramdown rate should be specific to the risk inherent in the debtor's plan and not an attempt to make the creditor whole based on its past or present circumstances.[9] They also both noted (repeatedly) that plan payments made to a creditor over time must be worth at least the value of the creditor's interest in its collateral on the plan's effective date.

In contrast, Justice Thomas's opinion is that the Bankruptcy Code "*does not require a debtor-specific risk adjustment* that would put secured creditors in the same position as if they had made another loan."[10] Justice Thomas acknowledged that a "promise of future payments is worth less than an immediate payment" of the same amount due, at least in part, to the risk of nonpayment,[11] but he argues that this is irrelevant because the statute does not ask the court to value the promise to distribute property under the plan in the *future*. Rather, Justice Thomas noted, the court should ensure that the value of the property to be distributed under the plan *at the time* of the plan's effective date is not less than the amount of the secured creditor's claim. His reasoning is based partly on the Supreme Court's opinion in *Associates Commercial Corp. v. Rash*,[12] which posited that the creditor is already receiving the benefit of the higher going-concern value rather than a lower liquidation value.

As a result, Justice Thomas took no such stance on whether to begin with a concededly lower formula-approach rate or the more likely higher contract rate. To the contrary, he merely noted in his belief that the plain meaning of the Bankruptcy Code does not require any risk adjustment. He stated that there is no reason to look beyond the "risk free" rate, as the Code does not require compensation for time or risk after a plan has been implemented.[13]

Under the Supreme Court's direction in *Marks*, we believe that this dispels the commonplace notion that the Court requires the use of the formula approach or any particular starting rate in a formula approach calculation. Rather, due to the Court's lack of a majority on this approach, its opinion provides no guidance on methodology and places this issue back into the hands of the various circuit courts around the nation.

The same analysis is true with respect to the evidentiary burden. Justice Stevens wrote that

5 *Id.* at 193 (citation omitted).
6 541 U.S. at 471.
7 *Id.* at 479.
8 Id. at 492.

9 As Justice Scalia stated in his opinion, his dispute with Justice Stevens's opinion was "over what procedure [would] more often produce accurate estimates of the appropriate interest rate. The plurality would use the prime lending rate ... and require the judge in every case to determine an amount by which to increase it.... I would instead adopt the contract rate ... as a presumption that the bankruptcy judge could revise on motion of either party." *Id.* 491-92.
10 *Id.* at 486 (emphasis added).
11 *Id.* at 485.
12 520 U.S. 953 (1997).
13 Justice Thomas stated that his analysis of the statute was "not to say that a debtor's risk of nonpayment *can never* be a factor in determining the value of the property to be distributed." *Till*, 541 U.S. at 488 (emphases added). However, his opinion is rather vague as to the circumstances under which a risk-adjustment to the interest rate might occur, but he goes on to state that "accounting for the risk of nonpayment in that case is not equivalent to reading a risk-adjustment requirement into the statute, as in the case of a note; [rather,] the risk of nonpayment is part of the value of the note itself." *Id.* at 489. Although we do not appear to have the full benefit of his thinking on this issue, we understand his ultimate conclusion that the statute calls for no risk-adjustment.

the primary evidentiary burden should lie with the creditor, "who [is] likely to have readier access to any information absent from the debtor's [pre-confirmation] filing."[14] (Although it is mere *dicta*, Justice Scalia indicated that the bankruptcy court could hold a hearing upon motion of either party, but does not directly cite an evidentiary obligation on behalf of either party.) Justice Thomas was silent on the issue of evidentiary burden, and since there was no concurrence on this issue, the issue again reverts back into the hands of the circuit courts. Similarly, in one of the most celebrated and debated footnotes in bankruptcy jurisprudence, Justice Stevens's footnote 14 indicates that at least a portion of the Justices focused on the case's potential application to chapter 11 cases.

> [T]here 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.[15]

Meanwhile, Justice Thomas is absolutely silent as to applicability of *Till* to chapter 11 cases. Indeed, he fails to mention chapter 11 or cite a single chapter 11 case in his opinion. Thus, footnote 14 is *dicta* in all respects, as it appears only in the opinion of four Justices with no concurring opinion. Once again, *Till* cannot provide the bond so often sought between itself and chapter 11, leaving practitioners with reservations about the applicability of *Till* to chapter 11.

Footnote 14 also provides practitioners with another often-quoted observation. The footnote states that if an efficient market exists for loans to a chapter 11 debtor, it "might make sense to look at that rate."[16] This observation has caused a plethora of courts to adopt this procedure in chapter 11 confirmation to determine the cramdown interest rate.[17] Since Justice Thomas does not discuss chapter 11 cases, any reliance on that quote is based merely on the non-binding *dicta* of Justice Stevens.

A Familiar Old Song

Many bankruptcy courts have begun to acknowledge these and other shortcomings within *Till*, and have taken a more retrospective perspective. Based on similar interpretations to ours in this article, some courts have courageously forged ahead, claiming that *Till* is not precedent and instead relying on pre-*Till* circuit precedent.

For example, in *In re MPM Silicones LLC*[18] and *In re Couture Hotels Corp.*,[19] both judges relied on prior circuit court cases in addition to, or instead of, *Till*. The results reached were vastly, if not startlingly, different. In *MPM*, a Second Circuit case that cites *In re Valenti*[20] for support, Hon. **Robert D. Drain** (U.S. Bankruptcy Court (S.D.N.Y.); White Plains) generally strips away most of the risk-adjustment in the cramdown interest rate, while in *Couture*, a Fifth Circuit case that cites *In re Texas Grand Prairie Hotel Realty LLC*[21] for support, Hon. **Barbara J. Houser** (U.S. Bankruptcy Court (N.D. Tex.); Dallas) seeks to specifically identify and compensate the creditor for the risks in the debtor's plan.

These two recent cases show how courts have indicated that chapter 11 does not require slavish devotion to *Till*, returning us to the pre-2004 debates and inconsistencies among the circuit courts. For instance, in *Grand Prairie*, the Fifth Circuit noted that while many courts have applied the formula approach cited in *Till* by Justice Stevens, they have done so because they were persuaded by the reasoning, not because they considered *Till* binding.[22] Similarly, in its "rejection" of *Till* in *MPM*, the district court affirmed the bankruptcy court's decision that rejected the market approach in chapter 11 cases by relying on *Valenti*, a pre-*Till* chapter 13 case in which the Second Circuit had rejected the market rate approach as support.[23]

Although we stood as one to listen and we hung on every word, as we read their troves of pages, we returned to being divided as we had been before the giants had spoken. abi

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14 *Id.* at 479.
15 *Id.* at 476 n.14 (internal citations omitted).
16 *Id.*
17 *See, e.g., In re Am. HomePatient Inc.*, 420 F.3d 559, 568 (6th Cir. 2005) (holding that "the market rate should be applied in Chapter 11 cases where there exists an efficient market," and the formula approach should be used only where no such market exists); *In re 20 Bayard Views LLC*, 445 B.R. 83, 107-08 (Bankr. E.D.N.Y. 2011) (same); *In re Bashas' Inc.*, 437 B.R. 874, 920 (Bankr. D. Ariz. 2010); *In re Prussia Assocs.*, 322 B.R. 572, 588-89 (Bankr. E.D. Pa. 2005).
18 531 B.R. 321 (S.D.N.Y. 2015).
19 No. 14-34874-BJH, 2015 WL 5176859 (Bankr. N.D. Tex. Sept. 2, 2015).
20 105 F.3d 55 (2d Cir. 1997). The authors note that Judge Drain misquoted *Till* as favorably citing *Valenti*, when only four Justices spoke favorably through Justice Stevens, four Justices spoke unfavorably through Justice Scalia, and one (Justice Thomas) does not cite *Valenti* at all. *Id.* at 69 (citing *Till*, 541 U.S. 465). The authors believe that constitutes a "draw" with respect to the Supreme Court's view on *Valenti*.
21 710 F.3d 324 (5th Cir. 2013).
22 *Id.* at 331. In fact, in *Grand Prairie*'s affirming the bankruptcy court, it flatly rejected a necessary reliance on the formula approach, because "[w]e do not suggest that the prime plus formula is the only — or even the optimal — method for calculating the Chapter 11 cramdown rate." *Id.* at 337.
23 *MPM*, 531 B.R. at 334 (citing *Valenti*, 105 F.3d 55). As to *Till*'s footnote 14, the district court stated that footnote 14 "can fairly be read to suggest ... that a court may want to consider market rates in the Chapter 11 context." *Id.* at 333.