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Feature

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Inflating Away *Till*

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Where a conclusion rests on an explicitly stated premise, that which imperils the latter necessarily impugns the former. To illustrate this principle, consider the dinosaur fence. Suppose that someone tells you that you had better build a tall, electrified fence around your property, because it turns out that dinosaurs are not extinct after all and you are therefore in tremendous danger. In this situation, the validity of the conclusion (being a prudent homeowner requires the construction of a large, dinosaur-proof barrier) depends a great deal on the validity of its precedent premise (dinosaurs are not extinct and are menacing your hometown). If dinosaurs are extinct, then you need not build a specialized fence to keep them at bay.

One of the most widely cited cases in modern bankruptcy jurisprudence, *Till v. SCS Credit Corp.*,[1] is now a dinosaur-fence case. *Till* was a chapter 13 case wherein the debtor sought to reduce a 21 percent interest rate on a $6,395 truck loan to 9.5 percent.[2] Its formula-based approach to cramdown interest rates was explicitly premised on the assumption that the prime rate would be higher — likely quite a bit higher — than the rate of inflation. The opposite is now true, and this calls for an immediate reevaluation of *Till*'s continued validity.

Till arose because the Bankruptcy Code permits the "cramming down" of a secured lender's interest rate but does not state the extent to which the unfortunate lender's rate should be downwardly crammed.[3] The judiciary stepped in to add the precision that Congress omitted.

The debtors in *Till* arrived at 9.5 percent by taking the national prime rate (then 8 percent) and adding a "risk premium" of 1.5 percent.[4] Answering the question of whether this was OK, a plurality of the U.S. Supreme Court endorsed a "prime-plus" formula approach for chapter 13 cramdowns.[5] According to the *Till* formula, the prime rate is adjusted, "generally" by an amount between 1 and 3 percent, to account for the debtor's risk of default.[6] The *Till* formula approach has been widely adopted since, and a general sense has developed that *Till*, a case decided to address the propriety of a 21 percent interest rate on a truck loan in a consumer case, provides a template for all cramdown situations.[7]

However, historical context matters,[8] for it is there where we can see the rampaging dinosaurs in *Till*'s premise. The interest rate ratified by the *Till* plurality was formulated in 1999.[9] Things were different then: Michael Jordan still played in the NBA, American mailboxes burst with an endless stream of CDs offering free samples of America Online, and, most importantly for these purposes, inflation was low (2.21 percent, to be exact).[10] The prime rate in 1999 was 8 percent, a figure substantially higher than the rate of inflation.[11]

The positive delta between the prime rate and the inflation rate was not lost on the Supreme Court. To the contrary, it was expressly mentioned in the plurality opinion. Justice John Paul Stevens justified the *Till* formula's use of the prime rate by noting that, as reported daily in the press, it "reflects the financial market's estimate of the amount a commercial bank should charge a creditworthy commercial borrower to compensate for the

1 541 U.S. 465 (2004).
2 *Id.* at 469-71.
3 *See, e.g., In re CE Elec. Contractors LLC*, 2022 WL 1420094, at *5 (D. Conn. 2022) ("Although the Bankruptcy Code provides for cramdown, it does not disclose a formula by which to calculate the interest rate that the debtor should pay the secured creditor on its replacement lien.").
4 *Till* at 469-71.
5 *Id.* at 480-81.
6 *Id.*
7 *See, e.g., First S. Nat'l Bank v. Sunnyslope Housing LP (In re Sunnyslope Housing LP)*, 859 F.3d 637, 646 (9th Cir. 2017) (applying *Till* to chapter 11 cramdown).
8 *Cf., U.S. v. State of Ga. (Troup Cnty.)*, 171 F.3d 1344, 1348 (11th Cir. 1999).
9 *Till* at 470.
10 "Value of $9,600 from 1999 to 2018," CPI Inflation Calculator, *available at* officialdata.org/1999-dollars-in-2018?amount=9600#:~:text=The%20inflation%20rate%20in%201999,year%20between%202018%20and%202022 (unless otherwise specified, all links in this article were last visited on June 27, 2022).
11 *Till* at 471.

opportunity costs of the loan, *the risk of inflation*, and the relatively slight risk of default."[12] This assumption — that the prime rate adequately compensates lenders for the risk of inflation — is an explicitly stated premise upon which the *Till* plurality opinion rests. However, it is no longer a valid premise.

As of June 2022, the prime rate stands at 4 percent.[13] Using the Consumer Price Index (CPI) as a benchmark, the current U.S. inflation rate stands at 8.26 percent.[14] It is possible (perhaps even probable) that the real rate of inflation is higher than the rate suggested by the CPI. The CPI excludes both food and energy prices because of their volatility, but the average American consumer both eats and drives, meaning that inflation in the prices of those commodities is no less real than price inflation in the items tracked under the CPI.[15] Whatever the limitations of the CPI, there can be no doubt that current levels of inflation are higher — much higher — than the 4 percent prime rate. In other words, while the prime rate may have amply compensated for inflation risk during the era considered by the *Till* Court, it does not do so now. This fact negates the premise upon which the *Till* plurality's conclusion rests. It is a maxim of the common law that "when the reason of a rule ceases, so should the rule itself."[16] The reason of *Till*'s rule — the assumption that the prime rate adequately compensates lenders for the risk of inflation — has ceased. So, then, must the rule itself.

The current period of high inflation being a relatively recent phenomenon, it does not appear that any published decision citing *Till* has addressed the central argument of this article. Thus, we are left to speculate about the contours of the post-*Till* world.

One key issue is likely to be the assignment of the burden of proof. Courts have interpreted *Till* as assigning the burden for supporting an upward adjustment to the 1 to 3 percent risk premium to the creditor, but this comes with an unforeseen, but now relevant, catch. As one court explained, "if the debtor proposes a rate that would compensate the creditor for inflation risk and a relatively slight risk of default (*i.e.*, something approximating the prevailing prime rate), then the evidentiary burden of an upward risk-based adjustment should be on the creditor."[17] In other words, prior to the current era of high inflation, when *Till*'s premise that the prime rate adequately accounted for inflationary risk was correct, the debtor satisfied his burden by simply proposing the prime rate (or something close to it) as his putative cramdown rate. However, with the rate of inflation at 8 percent and the prime rate at 4 percent, the debtor no longer "proposes a rate that would compensate the creditor for inflation risk" by proposing "something approximating the prevailing prime rate."

One can take the same division of the burden between debtor and creditor and apply it to the current inflationary environment. It should remain the debtor's burden to "propose a rate that would compensate the creditor for inflation risk," but that burden should no longer be deemed satisfied by a proposal of "something approximating the prevailing prime rate." To meet this burden now, a debtor seeking to cram down a secured lender's interest rate must make a *prima facie* showing that the proposed cramdown rate at least exceeds the current rate of inflation.

To be sure, there will be numerous issues that require further clarification. For example, is it sufficient to propose a rate that exceeds the rate of inflation described by the CPI, or must a proposed rate also exceed the rate of "real" inflation (*i.e.*, a rate of inflation that includes the cost of food and energy)? However these questions are resolved, they must be asked. The current period of sustained high inflation renders anachronistic the *Till* plurality's premise and thereby vitiates its holding. The parameters of the post-*Till* world may be uncertain, but that is nonetheless the world we now inhabit.

The simplest way to square the current economic environment with *Till*, and the nearly two decades of interpretive case law to emerge since *Till*, may be to start from the premise that the Supreme Court endorses a formula-based approach to the calculation of cramdown interest rates, even if the endorsed formula is no longer a viable option. This could be accomplished by adjusting the starting point so that the debtor is presumed to meet his burden by proposing a rate approximating either the prime rate or, if it is higher, the current rate of inflation in the U.S., whereupon the burden would then shift to the creditor to provide support for his desired risk premium. Once inflation has been taken into account, it could still be within the 1-3 percent range deemed acceptable by the Supreme Court in *Till*. This approach does the least violence to the *Till* holding and is therefore most consistent with the policy of *stare decisis*. Once the obsolete premise of the *Till* plurality is brought into consonance with the world's current situation, the remainder of the decision could be applied as it is written.

Conclusion

Case law should not be applied in a robotic or ahistorical manner, and *Till* is no exception. Where a holding rests upon an explicitly stated premise, the continued validity of that premise is a precondition to the continued validity of the holding. In this case, the *Till* decision was explicitly premised on the assumption that the prime rate would always compensate lenders for the risk of inflation. This was true at the time *Till* was decided. When the rate endorsed by the *Till* plurality was determined, the prime rate was nearly *four times higher* than the rate of inflation, but this is no longer the situation. In fact, the figures have inverted. The rate of inflation is now nearly twice the prime rate. Thus, the prime rate no longer adequately compensates lenders for the risk of inflation and can no longer serve as the unquestioned baseline for the rates of interest foisted upon crammed-down lenders in confirmed plans.

The better-reasoned approach would be to add the 1-3 percent risk premium endorsed by the *Till* plurality to a starting point that is the *higher* of either the prime rate or the current rate of inflation. This approach still might

12 *Id.* at 479 (emphasis added).
13 "Bonds and Rates," *Wall St. J.*, *available at* wsj.com/market-data/bonds.
14 "U.S. Inflation Rate," YCharts, *available at* ycharts.com/indicators/us_inflation_rate.
15 "Consumer Price Index for All Urban Consumers: All Items Less Food and Energy in U.S. City Average," Fed. Reserve Bank of St. Louis, *available at* fred.stlouisfed.org/series/CPILFESL#:~:text=The%20%22Consumer%20Price%20Index%20for,energy%20have%20very%20volatile%20prices.
16 *Galeppi Bros. v. Bartlett*, 120 F.2d 208, 210 (9th Cir. 1944).
17 *In re Murray Metallurgical Coal Holdings LLC*, 623 B.R. 444, 525 (S.D. Ohio 2021).

not adequately compensate secured lenders for the risk of inflation, but, in the current environment, it will come substantially closer than would a robotic application of the *Till* formula.

As inflation reverts to the mean and/or interest rates continue to rise, it is probable that the prime rate will once more exceed the inflation rate. However, we now know that the prime rate does not always compensate lenders for the risk of inflation. Thus, the *Till* formula should be revised to account for situations like those we are now experiencing, and using the higher of the prime rate or the inflation rate as the basis for the formula accomplishes that objective. **abi**

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