Isn't Bankruptcy for Creditors, Too?

Hot tips and practical advice for the creditor side of the Bar

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OBJECTIONS TO CONFIRMATION

General Plan Considerations

Some issues, of course, are common to all plans, whatever district, especially issues with regard to value, interest rate, the timing of payments, etc.

Value

As there is another session specifically addressing "Valuation Issues in Consumer Cases" by Judge Craig Gargotta and Attorney Stephen Wilcox, participants are advised to see that session for issues with regard to valuation

Interest Rate

Interest rates for Chapter 13 cases were established by *Till v. SCS Credit Corp*., 541 U.S. 465 (2004).

Even though *Till* was a plurality opinion, the Fifth Circuit has made clear that *Till* is still binding precedent with regard to Chapter 13 cases. *Drive Financial Services, L.P. v. Jordan*, 521 F.3d 343, 348-350 (5th Cir. 2008).

Till actually makes for an interesting read. While many bankruptcy attorneys are aware of its general holding, or what everyone says the general holding is - the interest rate in a Chapter 13 case shall be prime plus one to three points - few are aware of the rationale behind its holding.

It is interesting, for instance, that the Supreme Court recognized that, strictly speaking, they were deciding a *discount rate*, not an *interest rate*.

"The discount rate also refers to the interest rate used in discounted cash flow (DCF) analysis to determine the present value of future cash flows. The discount rate in DCF analysis takes into account not just the time value of money, but also the risk or uncertainty of future cash flows; the greater the uncertainty of future cash flows, the higher the discount rate." http://www.investopedia.com/terms/d/discountrate.asp

The legal fiction is that, at the moment of confirmation, the secured creditor receives from the debtor a payment equal to the value of its collateral. If this is not paid in a lump sum, however, a discount rate must be applied to make sure that the stream of payments is hypothetically equal to the current value of a lump sum payment. See, *In re Leath*, 389 B.R. 494, 500 (Bankr.E.D.Tex. 2008)

If one understands this rationale, then the various decisions following *Till*

make more sense. Till itself, and the decisions which have followed Till have held that:

> Contract rate is irrelevant with regard to the interest rate under the plan. *Till v. SCS Credit Corp*., 541 U.S. 465, 476-477 (2004)("Thus, a court choosing a cramdown interest rate need not consider the creditor's individual circumstances, such as its prebankruptcy dealings with the debtor or the alternative loans it could mke if permitted to foreclose. Rather, the court should aim to treat similarly situated creditors similarly.")
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> *Till* applies to over-secured creditors - *See*, *First United Security Bank v. Garner (In re Garner)*, 663 F.3d 1218 (11th Cir. 2011)*; In re Stringer*, 508 B.R. 668, 671-672 (Bankr.N.D.Miss. 2014)
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> > *But* - over-secured creditors are entitled to their contract rate of interest post-petition, pre-confirmation, per 11 U.S.C. §506(b). *Id*.
>
> *Till* applies to "910 claims" - *See, Drive Financial Services, L.P. v. Jordan*, 521 F.3d 343, 346-348 (5th Cir. 2008)
>
> "Sauce for the goose" - *Till* applies even if the contract rate of interest is lower than the *Till* rate - *See, In re Soards*, 344 B.R. 829 (Bankr.W.D.Ky. 2006); *Accord*, *In re Tirey*, 350 B.R. 62 (Bankr.S.D.Tex. 2006).
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> > This is so even if the plan pays the claim off *faster* than the original contract. *See, In re Taranto*, 365 B.R. 85 (6th Cir. B.A.P. 2007).
>
> *Till* does *not* apply to certain creditors, like ad valorem tax creditors. *Tax Ease Funding, L.P. v. Thompson* (*In re Kizzee-Jordan*), 626 F.3d 239 (5th Cir. 2010).

Under *Till*, the interest rate should be prime plus one to three percent. See, *In re Montemayor*, 2010 WL 5315814 (Bankr.S.D.Tex. 2010)("The Court finds the 5.25% rate consistent with Till's requirement that the required interest rate in a chapter 13 plan should be 1-3% above the prime rate.")[1] [2]

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[1] The prime rate at the time of the *Montemayor* decision was 3.25%. Indeed, the prime rate has been 3.25% since December 16, 2008. *See*, http://research.stlouisfed.org/fred2/data/PRIME.txt. For an explanation of the prime rate, see *In re Tirey*, 350 B.R. 62, fn 5 (Bankr.S.D.Tex. 2006).

[2] Mention should be made of Judge Jones decision in *In re Vasquez*, 2012 WL 3762981 (Bankr.S.D. Tex. 2012). Judge Jones started with the yield on a five-year treasury instrument (which was then at .8%) instead of with the prime rate. No other court has followed this holding and all the other reported decisions in the Fifth Circuit

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Also available as part of the eCourse
For the Creditors: Basics, Hot Tips, Developments and Issues in Consumer Bankruptcy Cases

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