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- Tax exempt financing of agriculture

Milk handlers' and producer's claims dismissed

In *Northwest Independent Producers Ass'n v. Veneman,* 312 F.Supp.2d 23 (D. D.C. 2004), the United States District Court for the District of Columbia held it lacked subject matter jurisdiction over claims brought by milk handlers because the handlers failed to exhaust their administrative remedies in accordance with the Agricultural Marketing Agreement Act of 1937 (AMAA), 7 U.S.C. §§ 601-614, 671-674. The court also held that it lacked subject matter jurisdiction over claims brought by a milk producer. *See id.* at 26.

Four cooperatives of dairy farmers and the Northwest Independent Producers Association (NWI) challenged a regulatory action of the Secretary of the United States Department of Agriculture that altered "the mechanism by which price values for various classes of milk are determined under the ... [AMAA] ...." *Id.* at 24. The dairy cooperatives also acted as milk "handlers." *See id.* NWI was a milk producer and did not own or operate any milk processing facilities. *See id.*

The Secretary argued the dairy cooperatives were precluded from seeking judicial review because they had failed to exhaust their administrative remedies. *See id.* The Secretary also argued that the district court lacked subject matter jurisdiction over NWI because the AMAA does not provide producers a right of judicial review. *See id.* The dairy cooperatives asserted that they had exhausted their administrative remedies since an administrative proceeding would have been "'chimerical and futile.'" *Id.* at 25 (citation omitted).

The court first considered whether the dairy cooperatives' claims should be dismissed for failure to exhaust administrative remedies. *See id.* It explained that the AMAA "requires handlers to petition the Secretary, have a hearing, and receive a ruling from the Secretary" before seeking judicial review. *See id.* The court determined that the dairy cooperatives' assertion that they had exhausted their administrative remedies was without merit. *See id.* It added that in *Block v. Community Nutrition Institute*, 467 U.S. 340 (1984), the Supreme Court stated that "'Congress unequivocally directed handlers first to complain to the Secretary'" and that it was "'clear that Congress intended judicial review of market orders issued under the Act ordinarily be confined to suits brought by handlers *in accordance with* ... [the AMAA].'" *Id.* (citation omitted). The court further

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Packaging chicken pelts considered secondary agriculture under FLSA

In *Pacheco v. Whiting Farms, Inc.*, 365 F.3d 1199 (10th Cir. 2004), the United States Court of Appeals for the Tenth Circuit held that an employee's duties of packaging chicken pelts constituted "secondary agriculture" under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219, and therefore the employee was not entitled to receive overtime compensation.

FLSA generally requires employers to pay employees "one and one-half times the employee's regular rate of pay (overtime) for each hour employees worked in excess of forty hours during any given week." *Id.* at 1201 (citation omitted). The FLSA exempts from this requirement "'any employee employed in agriculture.'" *Id.* (citation omitted).

Plaintiff Veronica Pacheco worked in the packaging department of Whiting Farms, Inc. ("Whiting Farms"), a company that bred, raised, euthanized, and processed chickens for their pelts. *See id.* at 1201. Although the plaintiff regularly worked over forty hours per week, she was never provided with overtime compensation. *See id.* at 1202. The plaintiff

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stated that:

> *Community Nutrition Institute* involved a suit by consumers, but the Supreme Court's rationale that "[a]llowing consumers to sue the Secretary would severely disrupt this complex and delicate administrative scheme [and] would provide handlers with a convenient device for evading the statutory requirement that they first exhaust their administrative remedies" applies equally here. In this case, handlers attempt to circumvent the plain statutory language by joining with a producer even though they have not exhausted their administrative remedies. Plaintiffs freely admit this is the case .... This attempt to bootstrap the claims of handlers who have failed to exhaust to the claims of another party is precisely at issue in *Commodity Nutrition Institute* and is prohibited. The ... handler plaintiffs' claims must be dismissed for lack of subject matter jurisdiction.

Id. (citations omitted).

The court next considered whether it had subject matter jurisdiction over NWI's claim. *See id.* at 26. The court explained that this issue was also determined in large measure by *Community Nutrition Institute. See id.* It stated that:

> the Supreme Court observed that Congress channelled [sic] disputes concerning marketing orders to the Secretary in the first instance because it believed that only he has the expertise necessary to illuminate and resolve questions about them. Had Congress intended to allow consumers to attack provisions of marketing orders, it surely would have required them to pursue the administrative remedies provided in . . . [the AMAA] as well. The restriction of the administrative remedy to handlers strongly suggests that Congress intended a similar restriction of judicial review of market orders.

Id. (citations omitted).

The court stated that this rationale applied to producers as well and that "the inclusion of producers in the administrative process but their exclusion from the provisions enabling judicial review is the type of omissions that indicate a specific Congressional intent to omit." *Id.* It added that:

> [t]his omission is attributed to Congressional intent that handlers be "relied upon to challenge agency disregard of the law." In the present case, this would be sufficient to determine that NWI cannot seek judicial review. NWI is joined by four handlers, showing a clear interest by those parties intended by Congress to challenge the agency's actions.

Id. (citations omitted). *See also id.* at 26-27 (discussing applicability of *Stark v. Wickard*, 321 U.S. 288 (1944) plaintiffs' claims)).

–Gaby R. Jabbour, National AgLaw Center Research Assistant

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brought an action against Whiting Farms and its controlling owners (collectively "the defendants"), alleging that the defendants failed to pay her overtime wages. *See id.* at 1201. The United States District Court for the District of Colorado held that the defendants were exempt from paying Pacheco overtime wages under the FLSA's agricultural exemption. *See id.* Pacheco appealed the district court's decision to the Tenth Circuit. *See id.*

The court explained that under FLSA:

> "Agriculture" includes farming *in all its branches* and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities ..., the raising of livestock, bees, fur-bearing animals, or poultry, and any practices... performed by a farmer *or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.*

Id. at 1203 (citation omitted). The court also explained that "FLSA's definition of agriculture 'includes farming in both a primary and a secondary sense'" and that "[t]o constitute secondary farming, the practice must be (1) performed by a farmer *or* on a farm, and (2) incident to *or* in conjunction with such farming operations." *Id.* at 1204 (citation omitted).

The court stated that the only question was:

> whether Defendants' packaging employees are performing a practice incident to or in conjunction with the primary and secondary farming operations at Whiting Farms when they place the pelts (1) into bulk storage, or (2) onto a board and into a zip-lock bag with a bar-code affixed to it, which is then scanned into a computer inventory system and delivered to the shipping department.

Id.

The court stated that:

> [w]e need not look far for the answer.... Defendants' employees who skin and trim the chickens begin preparing the pelts for market. Packaging employees, such as Plaintiff, then complete the job by either "delivering the pelt to storage" or "to carriers for transportation to market." Specifically, packaging employees deliver the pelt to storage if it is not needed to fill a current order; or if the pelt is needed to fill an order, the pelt is packaged and delivered to the shipping

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Bank's security interest in government payments not perfected

In *In re Stevens*, 307 B.R. 124 (Bankr. E.D. Ark. 2004), the United States Bankruptcy Court for the Eastern District of Arkansas ruled that Union Planters Bank had not perfected its security interest in debtor-farmers' direct and counter-cyclical program (DCP) payments because the financing statements filed by Union Planters Bank were not filed in the proper location.

In May, 2002, debtor-farmers executed a promissory note for $583,000 with Union Planters Bank (Union Planters) and granted to the bank a security interest in government payments. *See id.* at 126. In addition, Union Planters filed a financing statement (UCC-1) in both Craighead and Jackson counties, Arkansas, that claimed an interest in the debtors' crops, government payments, and any after-acquired property relating to debtors' crops and government payments. *See id.* at 127.

After completion of the Farm Service Agency assignment document by the debtor-farmers in October, 2002, the DCP payment entitlement accrued to the debtor-farmers. *See id.* at 130. On February 10, 2004, the debtors filed for bankruptcy. *See id.* at 128. The impetus of this case was the attempt by the debtor-farmers to obtain a crop operating loan pledging the DCP payments as collateral. *See id.* at 126. Union Planters argued that because the debtor-farmers had granted a security interest in after acquired-property arising from the government payments to them, which attached in October 2002, the DCP payments could not be pledged as collateral for the 2003 crop operating loan. *See id.* at 130. Further, Union Planters argued that the UCC-1 filings in Craighead and Jackson counties perfected its security interest in the DCP payments. *See id.* at 131.

The court stated that due to the after-acquired property clauses in the parties' security agreements, Union Planters had a security interest in the DCP payments and that the interest attached in October, 2002, when the debtors completed the FSA assignment. *See id.* at 130. The court explained, however, that the issue was whether Union Planters properly perfected its security interest in those DCP payments when it filed the UCC-1 filings in Craighead and Jackson counties. *See id.* at 131.

The court found error with Union Planters' reliance on Ark.Code Ann. § 4-9-501(a)(2), which provides in pertinent part that the proper location of filing is "the office of the circuit clerk in the county in which the debtor is located in this state if the debtor is engaged in farming operations and the collateral is equipment used in farming operations, or farm products, or accounts arising from the sale of farm products." *See id.* The court explained that the collateral in issue–the DCP payments–would be considered either accounts or general intangibles under the Uniform Commercial Code (UCC), and further agreed with the Eight Circuit's analysis in *Kingsley v. First American Bank of Casselton*, 865 F.2d 975 (8th Cir. 1989), where a similar issue was addressed. *See id.* at 132. However, the court stated that the DCP payments were not accounts arising from the sale of farm products as set out in Ark.Code Ann. § 4-9-501(a)(2) and relied upon by Union Planters. *See id.* Rather, the court stated that the proper section was Ark.Code Ann. § 4-9-501(a)(3) which provides that in all cases other than those addressed in § 4-9-501(a)(2), the proper place to file a financing statement is the office of the Arkansas Secretary of State. *See id.*

Because Union Planters did not file with the Secretary of State, the court ruled that its interest was not perfected in the DCP payments and that the debtors, as debtors in possession having the status of judicial lienholders, could avoid Union Planters' security interest under 11 U.S.C. § 544. *See id.* at 133.

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Purchasers acquire title to land by adverse possession

In *Manderscheid v. Dutton*, 88 P.3d 281 (Or. Ct. App. 2004), the Oregon Court of Appeals held that purchasers of land acquired title to land by adverse possession despite the fact that purchasers did not graze livestock without interruption on the disputed property. The court also held that the purchasers established that they or their predecessors occupied the property with a reasonable and honest belief that they owned the property. *See id.* at 284.

In 1977, defendant Jan Dutton purchased a 40-acre parcel of land. *See id.* at 282. Dutton later divided the property into four smaller parcels and sold one of the parcels, tax lot 2000, which was approximately nine acres. *See id.* At the time of sale, tax lot 2000 contained a mobile home "that straddled the northern boundary of the property, so that half of the home lay on lot 2000 and half of it on ... [Dutton's] property, lot 1900." *Id.* The new owners of tax lot 2000 erected a fence along a set of preexisting surveyor's stakes that encroached in several places on Dutton's property. *See id.*

In 1988, tax lot 2000 was sold to a new couple (hereinafter the "Haags"). *See id.* The Haags assumed that the fence line represented the property's boundary line. *See id.* From 1989 through 1997 the Haags grazed goats, cows, and pigs on pasture areas located within the fence. *See id.* In 1997, the Haags decided not to keep goats and began boarding horses "which grazed on the entire property, including the pasture areas of the disputed parcel." *Id.* The horses grazed for most of the year, although there were some periods of time in which horses were not grazed on the property. *See id.*

On March 1, 2000, the Haags sold tax lot 2000 to plaintiffs Mark and Tami Manderscheid. *See id.* The Haags told the plaintiffs that the property consisted of the land enclosed within the fenced-in area. *See id.* Shortly after, the plaintiffs discovered that the actual boundary was different from what was enclosed within the fence and brought an action against the defendant "to quiet title in the disputed parcel, alleging that they had acquired title to the parcel by adverse possession." *Id.* The trial court concluded that the plaintiffs "established all the elements of a statutory claim for adverse possession" in accordance with Oregon law and therefore entered judgment quieting title to the disputed parcel in favor of plaintiffs. *Id.* Dutton appealed the trial court's judgment to the Oregon Court of Appeals. *See id.*

Dutton argued that the plaintiffs failed to establish the elements of adverse possession as provided in Or. Rev. Stat. § 105.620. *See id.* She first argued that the plaintiffs failed to establish their continuous use on the disputed parcel for ten years because there was a break of at least several months in the grazing. *See id.* at 283. Dutton also argued that "even if the grazing was continuous for 10 years, under ... [§] 105.620(2)(b), it [was] insufficient to establish the required use of the disputed parcel." *Id.* Dutton further argued that the plaintiffs "failed to establish the additional statutory element that they or their prede-

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Determining the proper "cramdown" rate of interest in agricultural bankruptcies post-Till v. SCS Credit Corp.

By Harrison M. Pittman

On October 2, 1998, Lee and Amy Till purchased a used vehicle from Instant Auto Finance in Kokomo, Indiana. Little did they know that the events of that day would evolve into legal battles before a bankruptcy court, a federal district court, a circuit court of appeal, and the United States Supreme Court. Nor could they have known that those events would culminate in a legal precedent that helped resolve one of the most significant issues in Chapter 11, 12, and 13 bankruptcies: how to calculate the appropriate "cramdown" interest rate.[1] In *Till v. SCS Credit Corp.*,[2] the United States Supreme Court held in a plurality decision that the so-called "formula approach" is the appropriate method for determining the adequate rate of interest in a Chapter 13 cramdown. The "formula approach" requires that the prime national interest rate[3] serve as a baseline for determining the appropriate cramdown interest rate and that the rate be adjusted, if necessary, based on the risk of nonpayment.

The Tills filed a Chapter 13 bankruptcy petition in October of 1999.[4] Although they owed approximately $5,000.00 on their vehicle, the parties agreed that the value of the vehicle was $4,000.00.[5] The Tills proposed to pay their debt in 36 monthly principal payments along with an annual rate of interest of 9.5%, which represented a 1.5% modification of the national prime rate to compensate for the risk of nonpayment. Respondent SCS Credit Corp.[6] objected to the Tills' proposed rate of interest, arguing that it was "'entitled to interest at the rate of 21%, which is the rate ... it would obtain if it could foreclose on the vehicle and reinvest the proceeds in loans of equivalent duration and risk as the loan' originally made to the [Tills]."[7]

The bankruptcy court accepted the Tills' argument and confirmed their proposed bankruptcy plan.[8] On appeal, the district court adopted the respondent's argument and reversed the bankruptcy court, holding that the appropriate rate of interest was 21%.[9] The United States Court of Appeals for the Seventh Circuit upheld the district court's determination that 21% was the appropriate interest rate but based its determination on the parties' pre-bankruptcy contract that set the interest rate at 21%.[10] The Seventh Circuit held that the contract rate should "'serve as a presumptive [cram down] rate'" that either party could challenge with evidence that necessitated modification of that rate.[11] The United States Supreme Court subsequently granted certiorari and reversed the Seventh Circuit.[12]

Till involved a Chapter 13 bankruptcy filing and did not arise in an agricultural bankruptcy context. Thus, attorneys who represent clients involved in agricultural bankruptcies brought under Chapters 11, 12, and 13 of the Bankruptcy Code may not be aware of *Till* and its implications.[13] This article is not intended to serve as an exhaustive discussion of the *Till* decision but rather to bring *Till* to the attention of attorneys and trustees involved in agricultural bankruptcies and to highlight the important role it will play in agricultural bankruptcy litigation.

Background

An agricultural producer may file a Chapter 7, 11, 12, or 13 bankruptcy petition. Chapter 7 is considered a "liquidation" bankruptcy because the debtor's assets are sold, or "liquidated," and the proceeds distributed to creditors.[14] Thus, a farmer who wants to retain assets essential to its farming operation post-bankruptcy usually will not seek Chapter 7 protection. Chapters 11, 12, and 13 have important differences, but are considered "reorganization" bankruptcies.[15] In a reorganization bankruptcy, debtors can retain, or at least attempt to retain, assets that are subject to an allowed, secured interest, rather than relinquishing those assets for the benefit of creditors. Thus, a reorganization bankruptcy is particularly desirable to agricultural producers who intend to continue farming post-bankruptcy. *Till* applies to Chapters 11, 12, and 13 bankruptcies; it does not apply to Chapter 7 bankruptcy proceedings.

A debtor in a reorganization bankruptcy must propose a bankruptcy plan of reorganization that satisfies each allowed, secured creditor, and, if certain conditions are satisfied, the plan must be confirmed by the bankruptcy court.[16] The Code expressly provides Chapter 12 and Chapter 13 debtors three options with which they can satisfy creditors holding an allowed, secured claim. They may obtain the creditor's acceptance of the plan, surrender the property to the creditor, or provide the creditor both a lien in the property and "the value, as of the effective date of the plan, of property to be distributed under the plan ...."[17] Similar to Chapters 12 and 13, a Chapter 11 debtor may propose to provide the secured creditor a lien in the property along with "deferred cash payments totalling [sic] at least the amount" of the secured claim.[18] The option of providing the creditor a lien in the property along with the value of the property is commonly referred to as the cramdown option because it can be confirmed, or "crammed down," over the creditor's objections.[19] Although separate provisions govern cramdown for Chapters 11, 12, and 13, it has been noted that "courts and commentators have generally treated the question of how the cram down interest rate should be determined as a question that is answered the same in Chapter 11, 12, and 13 cases."[20]

To exercise the cramdown option, the debtor will typically propose that installment payments, along with an appropriate rate of interest, be made to the creditor over a period of time. Whatever form the payments take, however, the proposed payments must provide the creditor with a total present value that equals or exceeds the amount of the creditor's allowed secured claim.[21] In *Till*, the Court described the difficulty presented by this requirement:

> That command is easily satisfied when the plan provides for a lump-sum payment to the creditor. Matters are not so simple, however, when the debt is to be discharged by a series of payments over time. 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. *The challenge for bankruptcy courts reviewing such repayment schemes, therefore, is to choose an interest rate sufficient to compensate the creditor for these concerns.*[22]

The challenge of determining the proper interest rate has been answered in different ways by different courts. In *Till*, the plurality identified four methods that have been used to determine the appropriate cramdown interest rate: (1) the "formula rate" or "prime-plus" rate, (2) the "coerced loan rate" or "forced loan rate," (3) the "presumptive contract rate," and (4) the "cost of funds rate."[23]The "formula rate" requires that the national prime rate serve as a baseline amount, which can be augmented, if necessary, based on the risk of nonpayment.[24] The "coerced loan rate" requires the interest rate to be set at "the level the creditor could have obtained if it had foreclosed on the loan, sold the collateral, and reinvested the proceeds in loans of equivalent duration and risk."[25] The "presumptive contract rate"–a "slightly modified version" of the "coerced loan rate"

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approach–allows the interest rate in the parties' contract to "'serve as a presumptive [cram down] rate,' which either the creditor or the debtor could challenge with evidence that a higher or lower rate should apply."[26] The "cost of funds" approach inquires "'what it would cost the creditor to obtain the cash equivalent of the collateral from an alternative source.'"[27]

Discussion

Plurality decision

Justice Stevens, joined by Justices Souter, Ginsberg, and Breyer, adopted the formula rate approach and rejected the coerced loan, presumptive contract rate, and cost of funds approaches. The plurality recognized that although Congress' intent for determining the cramdown interest rate could not be discerned from the Chapter 13 cramdown provision, three factors governed courts' and trustees' consideration of the issue.[28] The first factor is that several Code provisions mirror the Chapter 13 cramdown provision by requiring courts to "discoun[t] ... [a] stream of deferred payments back to the[ir] present dollar value' ... to ensure that a creditor receives at least the value of its claim."[29] The plurality reasoned that Congress likely intended courts and trustees to apply an essentially uniform approach for determining the appropriate interest rate under the several provisions, particularly an approach generally known to the financial community and one that alleviated "the need for expensive evidentiary proceedings."[30]

The second factor is that courts have express authority under Chapter 13 "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.'"[31] Thus, courts and trustees have complete authority to disavow any contractual terms regarding any interest rates previously agreed to between the debtor and the creditor, as long as the terms are not a part of the contract for the debtor's principal residence.

The third factor is that from the creditors' point of view, the Chapter 13 cramdown provision mandates "an objective rather than a subjective inquiry."[32] Courts considering a proper cramdown interest rate can therefore ignore the creditor's individual circumstances and should attempt "to treat similarly situated creditors similarly, and to ensure that an objective economic analysis would suggest the debtor's interest payments will adequately compensate all such creditors for the time value of their money and the risk of default."[33]

The plurality concluded that these factors warranted rejection of the coerced loan, presumptive contract rate, and cost of funds approaches.[34] The formula approach, according to the plurality, had none of the defects associated with the other approaches. It explained that:

> unlike the coerced loan, presumptive contract rate, and cost of funds approaches, the formula approach entails a straightforward, familiar, and objective inquiry, and minimizes the need for potentially costly additional evidentiary proceedings. 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. For these reasons, the prime-plus or formula rate best comports with the purposes of the Bankruptcy Code.[35]

Concurring opinion

The concurring opinion, written by Justice Thomas, advanced the view that, in light of the "clear text" of the Chapter 13 cramdown provision, the risk of nonpayment was not a factor in determining the proper cramdown interest rate. It stated that the Chapter 13 cramdown provision "only requires the valuation of the 'property to be distributed,' not the valuation of the plan (*i.e.,* the promise to make the payments itself.)."[36] The concurrence continued, "[t]hus, in order for a plan to satisfy § 1325(a)(5)(B)(ii), the plan need only propose an interest rate that will compensate a creditor for the fact that if he had received the property immediately rather than at a future date, he could have immediately made use of the property."[37] The concurrence forwarded this view in light of its belief that "there is always a risk of nonpayment" when a debtor proposes to pay a debt to a creditor through a series of payments and that the "'*promise* of future payments is worth less than an immediate payment' of the same amount, in part because of the risk of nonpayment."[38]

The concurring opinion qualified its view in two respects. First, it stated that *"[i]n most, if not all, cases*, where the plan proposes simply a stream of cash payments, the appropriate risk-free rate should suffice."[39] This statement supposes that it may be appropriate to consider the risk of nonpayment in a relatively small number of instances. The concurrence limited these instances to those in which the property to be valued is a promise or a debt: "It is nonsensical to speak of a debtor's risk of default being inherent in the value of 'property' *unless that property is a promise or a debt*."[40]

Second, the concurrence stated that the risk of nonpayment could be a factor in determining the value of the property to be distributed in the debtor's bankruptcy plan. It reasoned that:

> Although "property" is not defined in the Bankruptcy Code, nothing in § 1325 suggests that "property" is limited to cash. Rather, "'property can be cash, notes, stock, personal property or real property; in short, anything of value. And if the "property to be distributed" under a Chapter 13 plan is a note (*i.e.,* a promise to pay), for instance, the value of that note necessarily includes the risk that the debtor will not make good on that promise. Still, 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, the risk of nonpayment is part of the value of the note itself.[41]

Dissenting opinion

Justice Scalia, joined by Chief Justice William Rehnquist and Justices O'Connor and Kennedy, rejected the formula approach and expressly adopted the presumptive contract rate approach because, despite its defects, the contract rate approach was the best estimate for determining the appropriate rate of interest in cramdown. The dissent identified several "imponderable" risk factors, such as the probability of plan failure and the rate of collateral depreciation, that courts must consider when determining an appropriate cramdown rate of interest. It stated that under the formula approach, a risk premium would have to be determined in every case, whereas under the contract rate approach "the task of assessing ... these risk factors is entrusted to the entity most capable of undertaking it: the market." [42] It added that:

> [a]ll the risk factors are reflected (assuming market efficiency) in the debtor's contract rate–a number easily found in the loan document. If neither party disputes it, the bankruptcy judge's task is at an end. There are straightforward ways a debtor *could* dispute it–for example, by showing that the creditor is now substantially oversecured, or that some other lender is willing to extend credit at a lower rate. But unlike the formula approach, which requires difficult estimation in every case, the contract-rate approach requires it only when the parties choose to contest the issue.[43]

Conclusion

The dissenting opinion's opening statement that "[m]y areas of agreement with the plurality are substantial" belies the effect that *Till* may have on debtors and creditors involved in agricultural bankruptcies brought under Chapters 11, 12, and 13. In short, *Till* presents creditors with an uphill battle in having bankruptcy courts establish a cramdown rate of interest that is substantially higher than the prime national rate of interest and strengthens the hands of debtors who desire the cramdown interest rate be established at or near the national prime rate.

Attorneys should be aware that bankruptcy courts and trustees could reasonably interpret *Till* to suggest that a rela-

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tively low adjustment should be used to compensate for the risk of nonpayment, even though the plurality expressly declined to determine the proper scale for the risk adjustment and stated that bankruptcy courts must establish an interest rate "high enough to compensate the creditor for its risk, but not so high as to doom the plan."[44] In remanding the matter back to the bankruptcy court for proceedings consistent with its opinion, the plurality noted that the bankruptcy court approved a risk adjustment of 1.5% and that "courts have generally approved adjustments of 1% to 3%."[45] This statement by itself could be interpreted as a tacit endorsement by the Court of a risk adjustment in the 1% to 3% range. In addition, the plurality stated that rather than adjusting the rate for the risk of nonpayment, bankruptcy courts may establish the cramdown rate without adjusting for risk of nonpayment: "We note that, if the court could somehow be certain a debtor would complete his plan, the prime rate would be adequate to compensate any secured creditors forced to accept the cram down loans."[46] Moreover, a court inclined to adopt this interpretation of *Till* would be encouraged by the concurring opinion's view that the risk of nonpayment should not be–at least in most bankruptcies–a factor in determining the appropriate cramdown interest rate.

Attorneys and trustees should also be aware that the potential impact in agricultural bankruptcies brought under Chapters 11, 12, and 13 is significant. For example, consider that the Tills proposed to make 36 monthly payments along with an interest rate payment of 9.5%. Because the secured value of the vehicle was $4,000.00, the Tills' monthly payments averaged $111.11 per month ($1,333.33 annually). An annual interest rate of 9.5% on this amount equals $126.66. Thus, the Tills' monthly payments, along with the annual interest rate, equaled $1,459.99 each year. Had the 21% interest rate been applied, however, the Tills would have paid $280.00, for a total of $ 1,613.33 per year in interest payments. Under these facts, the difference in the amounts seems insignificant. Applying the same basic calculation in a situation where a farmer owes $40,000.00 for farm equipment–an amount that is modest in some situations–creates a significant difference. For example, suppose that Farmer A proposes to pay the $40,000.00 secured claim in 72 monthly installment payments, totaling $555.55 per month, or $6,666.66 per year. An annual interest rate of 9.5% would equal $633.33 per year ($3,799.98 over a six-year period), and an annual rate of 21% would equal $1,400.00 ($8,400.00 over a six-year period). These two examples illustrate clearly the practical impact that *Till* could have on debtors and creditors involved in agricultural reorganization bankruptcies.

Finally, attorneys should be aware that bankruptcy courts and trustees may be less inclined to confirm a bankruptcy plan if the risk of nonpayment necessitates the establishment of too high an interest rate. In particular, the plurality stated that a bankruptcy court should probably not confirm a bankruptcy plan if "the likelihood of default is so high as to necessitate an 'eye-popping' interest rate ...."[47]

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Endnotes

[1] *See In re Mattson*, 210 B.R. 157, 159 (Bankr. D. Minn. 1997) ("Cramdown is the centerpiece of the reorganization chapters.").

[2] 124 S.Ct. 1951 (2004).

[3] *See Till*, 124 S.Ct. at 1961 (stating that "the national prime rate, reported daily in the press, which reflects the financial market's estimate of the amount a commercial bank should charge a creditworthy commercial borrower to compensate for the opportunity costs of the loan, the risk of inflation, and relatively slight risk of default."). *See also* Encyclopedia of Banking & Finance 830 (9th ed. 1991) (defining "prime rate" as the "interest rate most closely approximating the riskless or pure rate for money.").

[4] *See id.* at 1956.

[5] *See id.*

[6] Instant Auto Finance assigned its contract with the Tills to SCS Credit Corp. immediately after it entered into the contract. *See id.*

[7] *See id.*

[8] *See id.* at 1957.

[9] *See id.*

[10] *See id.* (citing *In re Till*, 301 F.3d 583, 591 (7th Cir. 2002)).

[11] *Id.* at 1957-58.

[12] *See id.* at 1958.

[13] Chapter 12 currently is not in effect.

[14] *See* Charles Jordan Tabb, The Law of Bankruptcy § 1.1, at 2 (1997).

[15] Reorganization bankruptcies are also referred to as "rehabilitation" bankruptcies. For purposes of simplicity, only the term reorganization is used in this article.

[16] *See* 11 U.S.C. § 1129 (Chapter 11), 11 U.S.C. § 1225 (Chapter 12), and 11 U.S.C. § 1325 (Chapter 13) (setting forth plan confirmation requirements).

[17] *See* 11 U.S.C. § 1325(a)(5) (Chapter 13) and 11 U.S.C. § 1225(a)(5) (Chapter 12). The statutory language set forth in §§ 1325(a)(5) and 1225(a)(5) is nearly identical.

[18] 11 U.S.C. § 1129(b)(2)(A)(I). A Chapter 11 debtor may also propose a sale of the property to which the liens in the property attach to the proceeds of the sale, or provide for the realization by secured claimholders of "the indubitable equivalent of such claims." 11 U.S.C. § 1129(b)(2)(A)(ii)-(iii).

[19] David G. Epstein, *Don't Go and Do Something Rash about Cram Down Interest Rates*, 49 Ala. L. Rev. 435, 436-437 (1998) ("A bankruptcy court can confirm a Chapter 11, 12, or 13 plan that modifies the rights of a secured lender without the consent of that creditor. In other words, the plan can be "crammed down" over the objection of the secured creditor.").

[20] *See id.* at 441-42. *See also In re Till*, 301 F.3d 583, 586-87 (7th Cir. 2002), *rev'd on other grounds*, 124 S. Ct. 1951 (2004) (stating that Chapter 11 and 12 contain analogous cramdown provisions); *Koopmans v. Farm Credit Services of Mid-America*, ACA, 102 F.3d 874, 875 (7th Cir. 1996) (Chapter 12 case citing Chapter 13 cramdown provision); *In re Smithwick*, 121 F.3d 211, 213-14 (5th Cir. 1997) (Chapter 13 case stating that Chapter 11 cramdown provisions are analogous to Chapter 13 provisions, and relying on Chapter 12 case considering cramdown); *In re Fowler*, 903 F.2d 694, 697 (9th Cir. 1990) (Chapter 12 case stating that Chapter 11 cramdown analysis applies to Chapter 12); *United States v. Arnold*, 878 F.2d 925, 928 (6th Cir. 1989) (stating that Chapter 12 and 13 cramdown provisions are identical and should be similarly construed). *But see*, *Till*, 124 S.Ct. at 1960 n.14 ("Thus, when picking a cram down 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.").

[21] *See Till*, 124 S.Ct. at 1955-56. The statutory bases for this requirement are found at 11 U.S.C. § 1129(b)(2)(A)(I) (Chapter 11), 11 U.S.C. § 1225(a)(5)(B) (Chapter 12), and 11 U.S.C. § 1325(a)(5)(B) (Chapter 13). *See also Rake v. Wade*, 508 U.S. 464, 472 (1993) (describing concept of present value).

[22] *Id.* at 1958 (emphasis added).

[23] *See id*. at 1956-58.

[24] *See id.* at 1957.

[25] *Id.*

[26] *Id.* at 1957-58 (citation omitted).

[27] *Id.* at 1958 (citation omitted). One scholar explained that "[b]y the time the issue had found its way to the Supreme Court, some form of the 'coerced loan method had been adopted by seven of the ten circuits to have considered the issue, whereas three circuits had adopted some form of the 'formula method.'" *See* Rebecca

Harper, *Supreme Court Issues Landmark Decision on Chapter 13 Cramdown Interest Rates*, National Consumer Law Center, May/June 2004, Vol. 22, *available at* http://www.consumerlaw.org/publications/reports/content/nclc_rept_bankr.pdf (subscription required to view entire document) (citing *Matter of Southern States Motor Inns, Inc.*, 709 F.2d 647 (11th Cir. 1983) (coerced loan approach), *In re Smithwick*, 121 F.3d 211 (5th Cir. 1997) (same), *United Carolina Bank v. Hall*, 993 F.2d 1126 (4th Cir. 1993) (same), *In re Hardzog*, 901 F.2d 858 (10th Cir. 1990) (same), *GMAC v. Jones*, 999 F.2d 63 (3d Cir. 1993) (same), *United States v. Arnold*, 878 F.2d 925 (6th Cir. 1989) (same), and *In re Kidd*, 315 F.3d 671 (6th Cir. 2003) (variation on coerced loan approach), *United States v. Doud*, 869 F.2d 1144 (8th Cir. 1989) (formula method), *In re Fowler*, 903 F.2d 694 (9th Cir. 1990) (same), and *In re Valenti*, 105 F.3d 55 (2d Cir. 1997) (same)). Rebecca Harper represented the Tills throughout their legal proceedings, including the arguing of their case before the Supreme Court.

[28] *See Till*, 124 S.Ct. 1951, 1958 (2004).

[29] *Id.* (quoting *Rake v. Wade*, 508 U.S. 464, 472 n.8 (1993) (footnote citations omitted)).

[30] *See id.* at 1958-59.

[31] *Id.* at 1959 (quoting 11 U.S.C. § 1322(b)(2)). Note that the Court referred specifically to authority available under Chapter 13. Chapters 11 and 12 contain provisions that authorize courts to modify claims. *See* 11 U.S.C. § 1123(b)(5) (same language as used in Chapter 13) and 11 U.S.C. § 1222(b)(2) (governing Chapter 12). Note also that unlike §§ 1322(b)(2) and 1123(b)(5), § 1222(b)(2) does not distinguish between courts' authority to modify creditors' rights in real property and personal property.

[32] *Id. See also id.* n. 13 ("We reached a similar conclusion in *Associates Commercial Corp. v. Rash*, ... when we held that a creditor's secured interest should be valued from the debtor's, rather than the creditor's, perspective.") (internal footnote citation and quotation omitted).

[33] *Id.* at 1960.

[34] *See id.* at 1960-61 (elaborating briefly on defects of each the three approaches as they relate to the Court's three factors for determining cramdown interest rates).

[35] *Id.* at 1961-62 (footnote citation omitted).

[36] *Id.* at 1966.

[37] *Id.*

[38] *Id.* at 1965.

[39] *Id.* at 1966 (emphasis added).

[40] *Id.*

[41] *Id.* at 1967.

[42] *Id.* at 1973.

[43] *Id.*

[44] *Id.* at 1962.

[45] *Id.* at 1962 (citing *In re Valenti*, 105 F.3d 55, 64 (2d Cir. 1997) (collecting cases), *abrogated on other grounds by Associates Commercial Corp. v. Rash*, 520 U.S. 953 (1997)).

[46] *Id.* at 1961 n.18.

[47] *Id.* at 1963 (citing *Till v. SCS Credit Corp.*, 301 F.3d 583, 593 (7th Cir. 2002) (Rovner, J., dissenting)).

Adverse possession/cont. from page 3

cessors in interest occupied the property with a reasonable and honest belief that the property was theirs. " *Id.* at 284.

The court explained that § 105.620(1)(a) requires a person who seeks to acquire title by adverse possession to establish that "'[t]he person and the predecessors in interest of the person have maintained actual, open, notorious, exclusive, hostile and continuous possession of the property for a period of 10 years.'" *Id.* at 283 (quotation omitted). It also explained that § 105.620(2)(b) provides that "'[a]bsent additional supporting facts, the grazing of livestock is insufficient to satisfy the requirements of ... [§ 105.620(1)(a)].'" *Id.* (quotation omitted). The court noted that in *Hoffman v. Freeman Land and Timber, LLC*, 994 P.2d 106 (Or. 1999) the Oregon supreme court stated that "'where continuous use is premised upon the grazing of livestock, the requisite continuity may be established by showing continuous use during the pasturing season.'" *Id.* (citation omitted). The court added that in *Terry v. Timmons*, 578 P.2d 405 (Or. 1978), it was "similarly explained that, where the hostile use involves grazing of livestock, 'continuity' may be satisfied by intermittent grazing that is consistent with the nature of the property." *Id.*

The court stated that "the disputed parcel is mostly dry and rocky, is not irrigated, and permits pasturing only a few horses or cows in the spring and winter." *Id.* It added that using the property "for grazing horses is thus consistent with the nature of the property, and the two- to three-month intervals during which there was a break in that use did not disturb the continuity of [the] plaintiffs' claim." *Id.* The court also stated that:

> [i]n this case, in addition to the grazing of livestock, there is evidence that they occupied the mobile home, used the septic tank, tended the garden ... maintained the fences, and built a second home on the disputed parcel. This is not a case in which adverse possession is predicated on the grazing of livestock alone.

Id. at 283-84.

The court finally stated that the Haags "did not know that the home was located on the boundary, and there were no external indicators that the lot was something other than the area enclosed by the fence." *Id.* at 284. The court concluded that "[u]nder these circumstances, we cannot say that, as a matter of law, the parties' belief about the extent of the property that they purchased lacked an objective basis and was unreasonable." *Id.*

–Gaby R. Jabbour, National AgLaw Center Research Assistant

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FLSA/Cont. from page 2

> department where UPS picks up the pelt and transports it to market. Plaintiff is therefore engaged in secondary farming under FLSA because she performs tasks incident to and in conjunction with Defendants' other agricultural operations.

Id. at 1204 (citations omitted). *See also id.* at 1205-07 (rejecting the plaintiff's arguments that the defendants' "processing operations change the 'raw and natural state' of the pelt thereby making the process more akin to manufacturing than to agriculture" and that "modernization of Defendants' farming operations bring them outside FLSA's definition of agriculture.").

–Gaby R. Jabbour, National AgLaw Center Research Assistant

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AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

The next issue of the Update will contain a more complete review of this year's annual conference in Des Moines, IA, but I thought I would announce here the recipients of this year's awards. Awards Committee chair, Don Uchtmann presented the Distinguished service award to Orville W. Bloethe for his more than seven decades of service to agricultural clients and to the legal profession through his writings and seminars. Don also presented the Professional Scholarship Award to Drew L. Kershen and the Student Scholarship award to Nicholas M. White. See the AALA web site for the details of these awards.

The Board of Directors appointed Robert P. Achenbach, Jr. as the full time executive director for 2005 and the membership approved a new membership level of "new professional" at an annual dues rate of $60 for the first three years after graduation from law school or College. The AALA welcomes Don Uchtmann as the new President-Elect and David Moeller and Michael Olexa as the new board members. Many thanks to John Becker (Past-President), Roger McEowen and Amy Swanson (board members) for their service to the board and association.

Set your calendars now for the 26th Annual Agricultural Law Symposium and Meeting in Kansas City, MO on October 7 and 8, 2005.