Bankruptcy: Determination of an Appropriate Cram-Down Interest Rate for the Family Farmer

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NOTES

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On November 26, 1986, the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986 became effective.[1] Among other things, the Act established Chapter 12 of the Bankruptcy Code.[2] Chapter 12 provides aid to financially troubled family farmers by allowing certain farmers relief from the burden of their debt.[3] Chapter 12 "is designed to give family farmers facing bankruptcy a fighting chance to reorganize their debts and keep their land."[4]

Previously, family farmers needing financial rehabilitation were forced to proceed under either Chapter 11 or Chapter 13 of the Code. However, most family farmers have too much debt to qualify as debtors under Chapter 13.[5] Likewise, family farmers have found Chapter 11 needlessly complicated, unduly time-consuming, and inordinately expensive.[6] Accordingly, Chapter 12 was a necessary legislative response designed to fill the gap left by the inadequate provisions for aiding family farmers in Chapters 11 and 13.

All debtors, whether filing under Chapter 11, 12, or 13, are required to submit a "plan of reorganization" that must be confirmed by the court.[7] When this plan is not acceptable to a particular creditor, it may be confirmed only over the dissent of such creditor.[8] As with Chapters 11 and 13,[9] one important

1. Pub. L. No. 99-554, § 302(a), 100 Stat. 3088 (1986) (codified in 28 U.S.C.A. § 152(a) (West 1987)).

2. Titled "Adjustments of Debts of a Family Farmer with Regular Annual Income." 11 U.S.C. §§ 1201-1231 (Supp. IV 1986).

3. 132 CONG. REC. S15075 (daily ed. Oct. 3, 1986) (statement of Sen. Thurmond).

4. 132 CONG. REC. H8999 (daily ed. Oct. 2, 1986) (joint explanatory statement of the Committee of Conference).

5. Chapter 13 has not been a valid alternative to farmers due to its low debt ceiling—$350,000 secured and $100,000 unsecured debt. 11 U.S.C. § 109(e) (Supp. II 1978).

6. 132 CONG. REC. H8999 (daily ed. Oct. 2, 1986) (joint explanatory statement of the Committee of Conference).

7. 11 U.S.C. § 1221 (Supp. IV 1986).

8. This procedure is called the "cram-down power." The cram-down interest rate is simply that rate used in a plan that is being crammed down onto a dissenting class of claims. Klee, *All You Ever Wanted to Know About Cram Down Under the New Bankruptcy Code*, 53 AM. BANKR. L.J. 133, 134 (1979).

9. 11 U.S.C. § 1129(b)(2)(A)(i)(II) (1982) provides:

> (2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class include the following requirements:
>
> (A)(i) With respect to a class of secured claims, the plan provides:
>
> (II) That each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

11 U.S.C. § 1325(a)(5)(B)(ii) (1982) provides:

aspect of the new Chapter 12 is the court's ability to force creditors to accept a debtor's reorganization plan if certain prerequisites are met.[10] This power, available to the bankruptcy court, is referred to as the "cram-down" procedure. One prerequisite of the cram-down procedure mandates that a creditor be given the "present value" of its claim against the debtor as consideration for accepting deferred payments under the submitted plan.[11] This forces the court to determine an appropriate interest rate for the deferred payments.

The appropriate cram-down interest rate is often debated because the rate may vary widely depending upon the method of calculation chosen by the court. Determination of the appropriate cram-down rate is likely to generate litigation under Chapter 12 because of the rate's critical effect on both creditors' interests and the feasibility of the debtor's reorganization plan.[12] Indeed, if the frequency of previous Chapters 11 and 13 cram-down litigation is any indication, disagreements on valuation and interest rates will be the origin of much contention between parties to bankruptcy cases. Consequently, the work for bankruptcy courts will increase.[13]

This note examines the valuation and determination of cram-down interest rates as applied to Chapter 12. It also examines and evaluates the various methods courts have used to calculate the cram-down interest rate. The note suggests that a cram-down rate based on the cost of funds to the creditor is the appropriate cram-down interest rate for Chapter 12.

Family Farmer Debt Adjustment Compared to Preexisting Chapters

The newly adopted Chapter 12 is a separate reorganization scheme closely modeled after Chapter 13.[14] However, new provisions in Chapter 12 differen-

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> (a) Except as provided in subsection (b), the court shall confirm a plan if—
> (5) with respect to each allowed secured claim provided for by the plan—
> (B)(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim.

10. 11 U.S.C. § 1225(a)(5)(B)(ii) (Supp. IV 1986) provides:

> (a) Except as provided in subsection (b), the court shall confirm a plan if—
> (5) with respect to each allowed secured claim provided for by the plan—
> (B)(ii) the value, as of the effective date of the plan, of property to be distributed by the trustee or the debtor under the plan on account of such claim is not less than the allowed amount of such claim.

11. *Id.*

12. Bromley, *The Chapter 12 Family Farm Bankruptcy Law: Changing the Rules*, 60 WIS. B. BULL. 18, 19 (1986).

13. The present backlog of many farm-belt bankruptcy cases may be partially remedied by the appointment of additional judges, increased allocation of funding, and the implementation of the United States Trustee program on a nationwide basis. Oklahoma will receive two additional judges, which should help alleviate the heavy docket in the northern and western districts. However, the future litigation of the cram-down problem will detract from any expected alleviation of work in Oklahoma's bankruptcy courts. Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, § 101, 100 Stat. 3088, 3089 (1986) (codified in 28 U.S.C.A. § 152(a) (West 1987)).

14. 132 CONG. REC. H8999 (daily ed. Oct. 2, 1986) (joint explanatory statement of the Committee of Conference).

tiate it from Chapters 11 and 13. As in Chapters 11 and 13, Chapter 12 requires that a creditor receive "adequate protection" for having its claim against the debtor compromised in bankruptcy. One significant difference in Chapter 12, however, involves the definition of "adequate protection." Although examples of adequate protection are set forth in the Code,[15] there is no clear definition, thus forcing courts to judicially define the phrase.

Under Chapters 11 and 13, the Fourth and Ninth Circuit Courts of Appeal have held that adequate protection requires the debtor to compensate the secured creditor for so-called "lost opportunity costs" where the value of the collateral is less than the amount of debt secured by the collateral.[16] A similar requirement in Chapter 12 would present serious barriers to farm reorganizations because farmland values have dramatically dropped in many agricultural states, including Oklahoma. Family farmers would often be unable to pay the "lost opportunity costs," thus eliminating, from the outset, any hope of reorganization.[17]

Congress determined that the payment of "lost opportunity costs" was too great an obstacle for family farmer reorganization. Therefore, the requirement that a debtor must compensate secured parties for such costs was not included in Chapter 12.[18] Unlike the other reorganization chapters, adequate protection under Chapter 12 requires only that the debtor pay a reasonable market rent to creditors secured by farmland collateral.[19] Thus, Congress made an important policy decision in favor of the farm debtor by forcing farm lenders to bear the burden of declining property values and the resulting "lost opportunity costs."

Many farm bankruptcies under Chapters 11 and 13 became deadlocked over the sale of farmland and farm equipment. The debtor believed he could get a better price through a private sale rather than letting the creditor dispose of the collateral. Consequently, another provision unique to Chapter 12 allows the trustee to sell such property without the consent of a creditor who has an interest in the property.[20] However, the creditor's interest attaches to the proceeds of the sale. Once again, Congress resolved an issue in favor of the farmer. Provisions such as these are designed to further the purpose of Chapter 12, providing a measure of leniency to account for special circumstances peculiar to farm debtors.

In an effort to balance the scales and avoid forcing farm lenders to shoulder the entire burden of the present agricultural and economic downturn, additional pro-creditor provisions were also included in Chapter 12. For example, if a plan of reorganization is not timely filed, the case will be dismissed and cannot be refiled.[21] This sanction is a powerful incentive for a debtor to move with

15. *See* 11 U.S.C. § 361 (Supp. II 1978).

16. Grundy Nat'l Bank v. Tandem Mining Corp., 754 F.2d 1436 (4th Cir. 1985); *In re* American Mariner Indus., Inc., 734 F.2d 426 (9th Cir. 1984).

17. 132 CONG. REC. H8999 (daily ed. Oct 2, 1986) (joint explanatory statement of the Committee of Conference).

18. *Id.*

19. 11 U.S.C. § 1205(b)(3) (Supp. IV 1986).

20. *Id.* § 1206.

21. *Id.* § 1208(c)(3).

all deliberate speed and avoid delays in implementing his plan. Likewise, if fraud is found, the case will be dismissed or converted to Chapter 7 for liquidation, thus encouraging good faith and honest dealings.[22] Also, a seven-year sunset provision is included that will repeal Chapter 12 unless Congress moves for its reenactment.[23] The seven-year sunset rule ensures that Congress will reevaluate the new chapter's effectiveness for enabling family farmers to reorganize their debts.[24] Provisions such as these were included to alleviate strong creditor opposition to the enactment of Chapter 12.[25]

Unlike the previous reorganization and liquidation chapters, Chapter 12 is tailored to a specific type of debtor. Chapter 12 applies only to "family farmers"[26] with regular annual income.[27] An individual, partnership, or corporation with less than $1.5 million in debt, 80 percent of which is attributable to farming operations, is eligible for relief under Chapter 12.[28] Moreover, 50 percent of the farmer's gross income must be derived from farming opera-

22. *Id.* § 1208(d).

23. Sunset provisions provide that after a fixed period of time, the legislation will go out of existence unless reenacted. This regulatory reform procedure will be useful to compel a thorough evaluation of the new chapter's effectiveness in light of experience.

24. Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. 99-554, tit. III, § 302(f), 100 Stat. 3088 (1986) (codified in 28 U.S.C.A. § 152a (West 1987)).

25. Creditors such as the Farm Home Administration and the American Bankers' Association no longer oppose the legislation due to the inclusion of provisions such as these.

26. 11 U.S.C. § 101(17) (Supp. IV 1986) provides:

> (17) "family farmer" means—
>
> (A) individual or individual and spouse engaged in a farming operation whose aggregate debts do not exceed $1,500,000 and not less than 80 percent of whose aggregate noncontingent, liquidated debts (excluding a debt for the principal residence of such individual or such individual and spouse unless such debt arises out of a farming operation), on the date the case is filed, arise out of a farming operation owned or operated by such individual or such individual and spouse, and such individual or such individual and spouse receive from such farming operation more than 50 percent of such individual's or such individual or spouse's gross income for the taxable year preceding the taxable year in which the case concerning such individual or such individual and spouse was filed; or
>
> (B) corporation or partnership in which more than 50 percent of the outstanding stock or equity is held by one family, or by one family and the relatives of the members of such family, and such family or such relatives conduct the farming operation, and
>
> (i) more than 80 percent of the value of its assets consists of assets related to the farming operation;
>
> (ii) its aggregate debts do not exceed $1,500,000 and not less than 80 percent of its aggregate noncontingent, liquidated debts (excluding a debt for one dwelling which is owned by such corporation or partnership and which a shareholder or partner maintains as a principal residence, unless such debt arises out of a farming operation), on the date the case is filed, arises out of the farming operation owned or operated by such corporation or such partnership; and
>
> (iii) if such corporation issues stock, such stock is not publicly traded;

27. *Id.* § 101(18) provides: "Family farmer with regular annual income' means family farmers whose annual income is sufficiently stable and regular to enable such family farmer to make payments under a plan under Chapter 12 of this title."

28. *Id.* § 101(17).

tions.[29] If the family farmer is a partnership or corporation, a single family must own more than 50 percent of the outstanding nonpublic stock.[30]

The Code's definition of a "farmer" is not overly restrictive, including within its scope entities such as feedlots.[31] A moderate judicial interpretation of the term "family farmer" will allow many agribusiness debtors, as well as the stereotypical farmer, to qualify for reorganization under Chapter 12. Moreover, almost all farmers will have access to Chapter 12.[32]

On the other hand, Congress intended only "family" farmers to benefit from Chapter 12. Accordingly, the definition of "family farmer" is somewhat limited. It will not, for example, allow large corporate entities or wealthy individuals with insignificant farm-related debt to take advantage of the new, more lenient provisions.

Although Chapter 12 includes many provisions less stringent than in other reorganization chapters, most of the traditional debtor requirements remain intact. For example, Chapter 12 requires farm debtors to submit a reorganization plan to the court for confirmation. If some creditors will not agree to the plan, the court may force the creditors to accept the plan. However, one requirement of this cram-down procedure is that the debtor provide each secured creditor the "present value" of his allowed claim.

Consistent Interpretation of "Value"

When the court forces the creditors to accept a proposed reorganization plan, a farm debtor is required to provide the holder of each secured claim with "value, as of the effective date of the plan" of not less than the allowed amount of the secured claim.[33] Stated differently, the "present value" of the farm debtor's proposed future payments to the creditor must equal the "value" of the creditor's secured claim.

Generally, "present value" is interpreted to mean the value of money at a present date that will be paid or received in future periods.[34] One need not

29. *Id.*

30. *Id.*

31. One court recently held a feedlot satisfied the Code's definition of "farmer." *In re* Cattle Complex Corp., 54 Bankr. 50 (Bankr. D.N.M. 1985). The Code has defined "farmer" and "farming operation" in 11 U.S.C. § 101(19), (20) (Supp. IV 1986), which provides:

> (19) "farmer" means (except when such term appears in the term "family farmer") [a] person that received more than 80 percent of such person's gross income during the taxable year of such person immediately preceding the taxable year of such person during which the case under this title concerning such person was commenced from a farming operation owned or operated by such person;
>
> (20) "farming operation" includes farming, tillage of the soil, dairy farming, ranching, production or raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state.

32. Congressional studies leading to the passage of Chapter 12 indicate that 90 percent of all farm debt is attributable to farmers whose debts are less than the new ceiling. 132 CONG. REC. S15092 (daily ed. Oct. 3, 1986) (statement of Sen. DeConcini).

33. 11 U.S.C. § 1225(a)(5)(B)(ii) (Supp. IV 1986).

34. C. MOYER, J. MCGUIGAN & W. KRETLOW, CONTEMPORARY FINANCIAL MANAGEMENT 54-58 (2d ed. 1984).

possess a great deal of business and financial expertise to appreciate that a dollar today is worth more than a dollar tomorrow. For example, $1,000 paid today is worth more than it would be if the same $1,000 were paid one year from today. Courts have followed the guidance of legislative history discussing the Chapter 11 cram-down provisions when adopting this concept of present value for purposes of the Code.[35]

The process of determining present value, frequently called "discounting," is important in Chapter 12 cases because it is inherently tied to the bankruptcy process. Typically, the farm debtor submits a reorganization plan to the court for confirmation. The plan will include proposed interest rates for the debtor's various financial obligations. If these rates are not acceptable to some or all of the secured creditors, the bankruptcy court may "cram" the debtor's proposed discount rate "down" onto the dissenting creditors.

A uniform interpretation of the Code's provisions on "value" is essential for fair and equitable decisions in bankruptcy cases. This is especially true because bankruptcy decisions immediately affect a multitude of parties and large amounts of money. Consequently, the phrase "value, as of the effective date of the plan," has properly been interpreted consistently throughout the Code by several courts.[36] For example, in *In re Architectural Design, Inc.*,[37] the debtor appealed a ruling that the interest rate prescribed by the Internal Revenue Code reflected the present value of deferred payments for priority unsecured tax claims.[38] Relying on the legislative intent of the deferred payment provision, the court concluded that the word "value" should be interpreted consistently throughout the Code.[39] This entitled the creditor to receive interest in an amount that made the deferred payments equivalent to the present value of the claim.

This conclusion is supported by the legislative history of the reorganization chapters. There is no definition of "value" either in the text or the legislative history of Chapter 12. However, the legislative history of Chapter 13 states that a debtor must distribute property of a value not less than the allowed amount of the secured claim,[40] "as of the effective date of the plan." This

35. *See, e.g.*, United States v. Southern States Motor Inns, Inc. (*In re* Southern States Motor Inns, Inc.), 709 F.2d 647, 652 (11th Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984); *In re* Architectural Design, Inc., 59 Bankr. 1019, 1021 (Bankr. W.D. Va. 1986).

36. *See, e.g.*, United States v. Southern States Motor Inns, Inc. (*In re* Southern States Motors Inns, Inc.), 709 F.2d 647 (11th Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984); *In re* Smith, 58 Bankr. 652 (Bankr. W. D. Va. 1985), *aff'd sub nom. In re* Architectural Design, Inc., 59 Bankr. 1019 (Bankr. W.D. Va. 1986).

37. 59 Bankr. 1019 (Bankr. W.D. Va. 1986), *aff'g In re* Smith, 58 Bankr. 652 (Bankr. W.D. Va. 1985).

38. This rate of interest is established by 26 U.S.C. § 6621 (1982). See *infra* notes 57-61 and accompanying text.

39. 59 Bankr. 1019, 1021 (Bankr. W.D. Va. 1986). The court discussed the legislative intent and stated that "[t]he legislative history of 1129(a)(9)(c) [sic] provides insight into the meaning of this phrase and indicates it should receive consistent treatment."

40. The allowed amount of a secured claim is simply the value of the property securing the claim. 11 U.S.C. § 506 (Supp. II 1984).

requirement is essentially the same as that mandated by Chapter 11.[41] These provisions suggest that the present value analysis under Chapter 13 should be interpreted consistently with the legislative history of Chapter 11. Accordingly, the absence of contradictory direction by legislators regarding the definition of "value" in Chapter 12 indicates that the interpretation of the term should be consistent with Chapters 11 and 13.

Finally, basic rules of statutory construction require consistent interpretation of similar statutes. Because the statutes requiring "value" are identical throughout the Code, they should be given the same meaning in each chapter.[42] In view of the foregoing principle and the Chapter 11 legislative history,[43] courts should use the term "value" in a manner consistent with other cases decided under different chapters of the Code.[44] Also, because Congress chose to use a word that has acquired a settled meaning under common law,[45] courts should infer that Congress incorporated the established meaning of that word in the Code.[46]

Despite the similarity of statutory language and legislative history regarding "value," many courts have concocted a variety of ways to determine the cram-down interest rate. This rate is integral to a determination of value, and the lack of uniformity has resulted in considerable confusion in bankruptcy proceedings.

Judicial Interpretation of Cram-down Interest Rate

Various methods are used to determine the interest rate that may be "crammed down" on dissenting creditors by bankruptcy courts. The number of available methods illustrates the diversity of decisions among courts. Some interest computation methods are statutory, while more discretionary methods are judicially created based on economic and legal considerations. The statutory rates include: the state judgment rate, the federal civil judgment rate, and the Internal Revenue Code rate. Judicially created rates include: the expert witness rate,

41. *See* [1978] U.S. CODE CONG. & ADMIN. NEWS 5787, 6385.

42. *See* Doctors Hosp., Inc. of Plantation v. Bowen, 811 F.2d 1448, 1452 (11th Cir. 1987) (presumption is made that the same words in different parts of an act have the same meaning). *Accord* Yamaguchi v. State Farm Mut. Auto. Ins. Co., 706 F.2d 940, 947 (9th Cir. 1983).

43. *See In re* Missionary Baptist Found. of Am., Inc., 12 Bankr. 570, 572 (Bankr. N.D. Tex. 1981). A presumption arises where the same words are used in different parts of an act and where the meaning in one instance is clear, that other uses of the word have the same meaning.

44. *See* Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979). *Accord* Agosto v. Barcelo, 594 F. Supp. 1390, 1393 (D.P.R. 1984). When a term is used in different statutes but in the same context and manner, courts are to presume Congress intended the later use to be construed in the same way as the earlier use.

45. *In re* Architectural Design, Inc., 59 Bankr. 1019, 1021 (Bankr. W.D. Va. 1986).

46. *See* NLRB v. Amax Coal Co., 453 U.S. 322, 329 (1981). *See also* United States Dep't of Health & Human Serv. v. Smith, 807 F.2d 122, 124 (8th Cir. 1986). Where Congress uses terms that have acquired settled meaning under common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of those terms.

the contract rate, the current market rate, the "cost of funds" rate, and rates established by averaging or including arbitrary leveling factors.

Statutory Rates

State Judgment Rate

The state statutory judgment rate of interest is the rate prescribed by statute that is applicable to civil judgments.[47] It has long been considered a "convenient yardstick to determine necessary incremental adjustments" to the deferred payments.[48] However, convenience is not the only justification for its use. One court concluded that interest at the legal rate was required to maintain a balance of equities between the creditor and the debtor.[49] This court rationalized that a debtor, upon filing a reorganization plan, "confesses judgment" on prepetition obligations. This confession of judgment would theoretically entitle secured creditors to interest at the legal rate for a delay in payment and in lieu of liquidation of the collateral.[50]

The legal rate has also been used to compensate creditors for the deprivation of a possessory interest in property.[51] While some courts have used the legal rate as the sole indicator of the proper cram-down rate, others have limited its applicability to the function of an averaging factor.[52] One obvious limitation is that this rate bears no relation to current market interest rates. Being an arbitrary rate, the state judgment rate does not fluctuate to meet current conditions as other rates of interest change.

Federal Civil Judgment Rate

A second rate that may be used in the present value computation is the federal civil judgment rate of interest. This rate is based on the "average accepted auction price of the last auction of fifty-two week United States treasury bills."[53] It is easy to calculate and accurately reflects current market conditions because treasury bills are auctioned every four weeks.

47. Statutory judgment rate or legal rate is the interest rate prescribed by state law for civil judgments. 12 OKLA. STAT. § 727 (Supp. 1987) provides:

> A. All judgments of courts of record shall bear interest at a rate prescribed pursuant to subsection B of this section. . . .
>
> B. For purposes of this section, interest shall be at an annual rate equal to the average United States Treasury Bill rate of the preceding calendar year as certified to the Administrative Director of the Courts by the state Treasurer on the first regular business day in January of each year, plus four precentage points.

48. *In re* Crockett, 3 Bankr. 365, 368 (Bankr. N.D. Ill. 1980). *See also In re* Marx, 11 Bankr. 819 (Bankr. S.D. Ohio 1981) (court acknowledged rate as administratively convenient disbursement of Chapter 13 dividends).

49. *In re* Marx, 11 Bankr. 819, 821 (Bankr. S.D. Ohio 1981) (touchstone of decisions on allowance of interest in bankruptcy has been the balance of equities between creditors and debtor).

50. *Id.* at 822.

51. *See, e.g., In re* Johnston, 44 Bankr. 667 (Bankr. W.D. Mo. 1984); *In re* Coburn, 38 Bankr. 550 (Bankr. W.D. Mo. 1983).

52. *See, e.g., In re* Hyden, 10 Bankr. 21 (Bankr. S.D. Ohio 1980) (court averaged the legal rate with the contract rate and an arbitrary 6 percent rate).

53. The federal civil judgment rate is the rate set according to 28 U.S.C. § 1961(a) (1982) for interest on judgments in federal court. Section 1961(a) provides that:

The rate's responsiveness and ease of calculation have justified its use by a number of courts.[54] Also, any profit element reflected in treasury bill coupon yields may be offset against the risk that the confirmed plan will not be successful.[55] However, the fact that treasury bills are risk-free means that a higher rate may be more appropriate in a commercial context involving some credit risk.[56] In light of these considerations, the use of the federal civil judgment rate has some relevance but falls short of creating the judicial equivalent of a debtor-creditor financing arrangement.

Internal Revenue Rate

A third alternative rate is the Internal Revenue Code rate of interest imposed on delinquent taxpayers.[57] This rate is based on a six-month average of the prime rate of interest.[58] However, the IRC rate, revised only semiannually, is not reasonably responsive to current economic changes.[59]

> (a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefore may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills set.

54. *See, e.g., In re* Tacoma Recycling, Inc., 23 Bankr. 547 (Bankr. W.D. Wash. 1982).

55. *In re* Mitchell, 39 Bankr. 696, 702 (Bankr. D. Or. 1984) (fact that the sale of treasury bills does not adequately reflect risk and profit was not fatal to the court's use of treasury bill rate as the appropriate discount factor).

56. *Id.*

57. The Internal Revenue Code judgment rate of interest is that rate prescribed by 26 U.S.C. § 6621(b) (1982). Section 6621(b) provides that:

> (b) Adjustment of interest rate
>
> (1) Establishment of adjusted rate
>
> If the adjusted prime rate charged by banks (rounded to the nearest full percent)—
>
> (A) during the 6-month period ending on September 30 of any calendar year, or
>
> (B) during the 6-month period ending on March 31 of any calendar year, differs from the interest rate in effect under this section on either such date, respectively then the Secretary shall establish, within 15 days after the close of the applicable 6-month period, an adjusted rate of interest equal to such adjusted prime rate.
>
> (2) Effective date of adjustment
>
> Any adjusted rate of interest established under paragraph (1) shall become effective—
>
> (A) on January 1 of the succeeding year in the case of an adjustment attributable to paragraph (1)(A), and
>
> (B) on July 1 of the same year in the case of an adjustment attributable to paragraph (1)(B).

58. Prime rate is defined by the Internal Revenue Code in section 6621(c), which provides that: "(c) Definition of prime rate: For purposes of subsection (b), the term 'adjusted prime rate charged by banks' means the average predominant prime rate quoted by commercial banks to large businesses, as determined by the Board of Governors of the Federal Reserve System." 26 U.S.C. § 6621(c) (1982).

59. *In re* Ziegler, 6 Bankr. 3, 6 (Bankr. S.D. Ohio 1980) (rate and technique for deriving rate provided by statute seem to provide equitable solution to determine "an appropriate factor").

Although responsiveness and revision are somewhat limited, the rate poses no inherently unfair burden on debtors.[60] Some courts have used this rate as an equitable alternative to imposing unreasonable and inequitable rates of interest that would jeopardize an otherwise judicially acceptable plan to the detriment of the remaining creditors and the debtor.[61] However, like treasury bill rates, the IRC rate index bears no logical relationship to interest rates normally expected by debtors and creditors in commerical financing arrangements. Therefore, like the treasury bill rate, its application in a commercial context represents a purely arbitrary choice.

Discretionary Methods

Expert Witnesses

A less frequently used method for determining the cram-down interest rate is through the testimony of expert witnesses. This method has been acknowledged by those courts that advocate a case-by-case approach.[62] One benefit of this approach is that it allows courts to fashion an arrangement that is logically related to the particular reorganization, rather than being entirely the result of an unrelated index rate. However, this same flexibility results in a nonuniform determination of value from one case to the next. Because no uniform method is used for determining the cram-down rate, expert testimony is a weighty factor in the determination of the appropriate rate if not sufficiently rebutted.[63] Consequently, a battle ensues between experts, increasing both litigation costs and the amount of time necessary to resolve the dispute.

Contract Rate

The interest rate specified in the contract between the creditor and the debtor may also be used to determine the cram-down rate. The consensual nature of the contract rate is a persuasive factor when weighing the feasibility and reasonableness of several applicable interest rates.[64] This rate presents a problem, however, because it may favor either the creditor or the debtor depending upon the particular circumstances of the case. For example, creditors have been held to interest rates that were less than half the prime lending rate because general market interest rates rose after the contract was executed.[65] Alternatively, the contract rate may be higher than the current market rate

60. *Id.*

61. *See, e.g., In re* Strong, 12 Bankr. 221 (Bankr. W.D. Tenn. 1981); *In re* Busman, 5 Bankr. 332 (Bankr. E.D.N.Y. 1980).

62. *See, e.g.,* United States v. Neal Pharm. Co., 789 F.2d 1283 (8th Cir. 1986) (held that determination of what interest rate would provide the government with the present value of its claim must be made on case-by-case basis).

63. *See, e.g., In re* Moore, 25 Bankr. 131 (Bankr. N.D. Tex. 1982) (adopted the interest rate established by debtor's uncontradicted expert testimony).

64. *See* General Motors Accept. Corp. v. Anderson (*In re* Anderson), 6 Bankr. 601 (Bankr. S.D. Ohio 1980).

65. *See, e.g., In re* Evans, 20 Bankr. 175, 177 (Bankr. E.D. Pa. 1982).

because the debtor was desperate for credit at the time of the lending transaction.

Although some courts have held the contract rate to be persuasive evidence of a "fair return,"[66] many elements of a "fair return," such as profit, may not be appropriate in bankruptcy proceedings.[67] Similarly, courts presuming that the cram-down rate and the contract rate are equivalent often erroneously rely on legislative history. The legislative history discusses the presumption of equivalency in the inappropriate context of unsecured creditors.[68] However, courts are less likely to impose the contract rate on debtors in cases where market interest rates have dramatically fallen since the contract was signed.[69] This results in a serious nonuniformity of the application of this theory to debtors and creditors.

Current Market Rate

Some courts determine the cram-down rate through the use of the current market rate of interest for similar loans. The rationale behind this method was initially set forth in the treatise, *Collier on Bankruptcy*, and has been subsequently adopted by many courts.[70] Collier considers the cram-down rate to be equal to the interest rate the objecting creditor would charge for a loan of the same type that the debtor is "coercing" the creditor to provide in the bankruptcy setting.[71] Collier's coerced loan theory (Collier's Theory) combines several independent factors to determine the appropriate interest rate. These factors are: (1) the term of the loan, (2) the quality of security, and (3) the risk of subsequent default.[72] One obvious shortcoming of this theory is that a consensual loan is simply not equivalent to a loan "coerced" in bankruptcy.

Cost of Funds

A fourth method, which is similar to Collier's Theory, is the "cost of funds" approach. The rationale behind this approach is that a creditor compelled by a bankruptcy court to extend the payment term of a prior credit arrangement should receive the replacement cost of the delayed payments.[73] The "cost of funds" approach is designed to compensate creditors for their replacement cost.

66. *Id.* (court held contract rate was proper because parties orginally agreed it provided a fair return).

67. See *infra* note 107 and accompanying text.

68. *In re* Smith, 4 Bankr. 12, 13 (Bankr. E.D.N.Y. 1980) (court recognized that holding was based on legislative intent taken out of context).

69. *See, e.g., In re* Patel, 21 Bankr. 101 (Bankr. M.D. Fla. 1982); *In re* Evans, 20 Bankr. 175 (Bankr. E.D. Penn. 1982).

70. *See, e.g.*, United States v. Southern States Motor Inns, Inc. (*In re* Southern States Motor Inns, Inc.), 709 F.2d 647 (11th Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984); *In re* Benford, 14 Bankr. 157 (Bankr. W.D. Ky. 1981).

71. 5 COLLIER ON BANKRUPTCY ¶ 1129.03, at 1129-62 (L. King 15th ed. 1986).

72. *Id.* at 1129-65.

73. *In re* Johnson, 8 Bankr. 503 (Bankr. S.D. Tex. 1981) (court acknowledged goal of compensating the creditor for replacement costs).

In most of the other methods, the creditor receives interest at a rate greater than its cost of borrowing, allowing it to realize a profit from the delayed payments. However, this allows the creditor to receive more than the present value of its claim.[74] The cost of funds approach requires a determination of the interest rate at which creditors borrow replacement funds. The necessity of determining the creditor's borrowing rate has created a difference of opinion among a number of courts.[75] In addition, the cost of funds may vary greatly over the life of the loan. Consequently, there is no way to exactly compensate the creditor without constantly readjusting the loan rate.

One court, while acknowledging the cost of funds approach as correct, opted for another rate that could be more easily determined.[76] Simplicity is not the sole determining factor, but was, in the court's opinion, a valid consideration.

Hybrid Methods

Finally, citing a number of justifications, other courts have adopted a wide range of hybrid methods for determining the appropriate discount rate. These interest rates are composed of, or influenced by, several of the rates previously discussed. Some courts average the interest rates to provide an equitable reorganization plan and satisfy all parties.[77] Sometimes arbitrary rates are imposed or included as leveling factors in the interest formulas.[78] Fairness is a motivational factor for averaging. Averaging allows development of a reasonable interest rate for a particular bankruptcy proceeding.[79] Several examples of hybrid rates include: the average of the debtor's contract rate with the current rate for similar transactions;[80] the average of the legal judgment rate with the contract rate;[81] the average of the debtor's contract rate, the statutory maximum rate on installment contracts, and an arbitrary percentage (e.g., 6 percent) as a leveling factor.[82] Overall, however, hybrid methods, because they are discretionary, lack the uniformity that is mandated by the Code and suggested by the legislative history.

When applying Chapters 11 and 13, courts have either adopted a statutory rate or have utilized a method involving a greater degree of discretion. As presented above, the diversity of available alternatives for calculating the cramdown interest rate makes the courts' task of choosing an appropriate rate for Chapter 12 most difficult.

74. General Motors Accept. Corp. v. Willis (*In re* Willis), 6 Bankr. 555, 563 (Bankr. N.D. Ill. 1980) (court discussed the procedure a creditor would follow to secure replacement operating funds).

75. *See, e.g.*, *In re* Wilkinson, 33 Bankr. 933, 936 (Bankr. S.D.N.Y. 1983); *In re* Campbell, 16 Bankr. 496, 497 (Bankr. N.D. Ill. 1982).

76. *In re* Johnson, 8 Bankr. 503, 506 (1981).

77. *See* General Motors Accept. Corp. v. Hyden (*In re* Hyden), 10 Bankr. 21, 27 (Bankr. S.D. Ohio 1980).

78. *Id.* at 28.

79. *Id.* at 27.

80. General Motors Accept. Corp. v. Miller (*In re* Miller), 13 Bankr. 110 (Bankr. S.D. Ind. 1981); *In re* Kibler, 8 Bankr. 957 (Bankr. D. Haw. 1981).

81. *In re* Klein, 10 Bankr. 657 (Bankr. E.D.N.Y. 1981).

82. General Motors Accept. Corp. v. Hyden (*In re* Hyden), 10 Bankr. 21 (Bankr. S.D. Ohio 1980).

Valuation of Secured Claims in Chapter 12 Reorganization Plans

In re Citrowske: The Valuation Problem Perpetuated

At present, decisions discussing the cram-down provision in the context of Chapter 12 are few. Unfortunately, those few have not resolved the valuation dilemma that exists in Chapters 11 and 13.[83] The court must determine the discount rate to use in the present value calculation. To illustrate, *In re Citrowske* involved a Chapter 12 reorganization plan submitted for confirmation by the debtors.[84] One creditor, Production Credit Association, objected to the plan's proposed deferred payment interest rate. The *Citrowske* court denied confirmation of the debtors' reorganization plan partly because of the inadequacy of the proposed cram-down rate.[85]

Citrowske held the cram-down provision in Chapter 12 provided that a secured creditor who is being paid over a period of time is entitled to the present value of its allowed secured claim.[86] The court adopted the "current market rate" as the appropriate interest rate to determine present value.[87] To support its conclusion, the *Citrowske* court relied on two Chapter 11 cases.[88] Both cases used Collier's market rate approach.[89]

83. Recently, an Oklahoma court adopted a slight variation of the cram-down interest rate that this note proposes is appropriate for Chapter 12 proceedings. *In re* Hardzog, 74 Bankr. 701 (Bankr. W.D. Okla. 1987). The *Hardzog* court rejected the contract rate that was advocated as the correct cram-down rate by the lender, Federal Land Bank of Wichita. The court considered most of the rates previously discussed in this note and likewise held the appropriate cram-down interest rate to be the creditor's "cost of funds" approach plus a slight risk factor (.7%). The minimal risk adjustment was compensation for the "risk to this lender [FLB] in lending to these particular borrowers [the Hardzogs]." 77 Bankr. 840, 842 (Bankr. W.D. Okla. 1987) (subsequent hearing to calculate lender's cost of funds).

The *Hardzog* court reasoned the lender assumed very little risk in this reorganization because of two factors. First, the court would not confirm the Hardzogs' plan unless they delivered a deed in lieu of foreclosure to the trustee. Second, the existing 12 percent equity cushion between the amount of the secured claim and the value of the property was held adequate to pay interest accrued to date while also providing an allowance for the property's depreciation.

84. 72 Bankr. 613 (Bankr. D. Minn. 1987). Only one other court has addressed the Chapter 12 cram-down interest rate issue, but no decision was made on the proper interest rate. *In re* Rott, 73 Bankr. 366 (Bankr. D.N.D. 1987). The court struck down the debtor's proposed interest rate, which was 3 percent above inflation rates and adjusted annually. Because it was substantially less than the prime rate and almost one-half the rate the creditor currently provided its best customers, confirmation of the plan was denied.

85. *Citrowske*, 72 Bankr. at 618.

86. *Id.* at 617.

87. *Id.* The *Citrowske* court held that: "[a]bsent any evidence of collusive or discriminatory policies, the interest rate which the creditor involved would charge to the debtor in the present regular loan market is presumptively the correct interest rate."

88. United States v. Neal Pharm. Co., 789 F.2d 1283 (8th Cir. 1986); Prudential Ins. Co. of Am. v. Monnier (*In re* Monnier Bros.), 755 F.2d 1336 (8th Cir. 1985). The decision illustrated the *Citrowske* court's willingness to apply Chapter 11 precedent to Chapter 12 subject matter. The court offered no explanation or support for this analytical leap.

89. *Citrowske*, 72 Bankr. at 617, quoting 5 COLLIER ON BANKRUPTCY, *supra* note 71, ¶ 1129.03, at 1129-65, stating that:

> The appropriate discount rate must be determined on the basis of the rate of interest which is reasonable in light of the risks involved. Thus, in determining the discount rate, the court must consider the prevailing market rate for a loan of a term equal

The adoption of the "current market rate" approach has met with some criticism.[90] However, its application may be construed as an indication of the *Citrowske* court's desire for uniformity of interpretations among the various chapters of the Code.

As previously discussed, uniformity is necessary to provide predictable and equitable decisions in bankruptcy courts. Such uniformity is difficult to achieve if each court employs a different rationale to support its decision regarding an appropriate cram-down rate. A single method of analysis is therefore needed to aid in the adoption of a uniform method of cram-down interest rate calculation.

Cram-down Uniformity: Consistency of Application

Many courts use a four-pronged analysis to interpret statutes.[91] The prongs include: (1) the explicit language of the statute; (2) the legislative history of the provision; (3) the general policy behind the legislation; and (4) concepts of reasonableness.[92] Consequently, it is sensible to use the same mode of analysis to construe the cram-down statute of the Family Farmer Bankruptcy Act. First, the explicit language of the Chapter 12 cram-down provision contains the key phrase "value, as of the effective date of the plan."[93] Unfortunately, "value," as used within the statute, is inherently ambiguous. Scrutinizing the explicit wording of the statute, therefore, sheds no light on the problem and forces courts to examine the three remaining analytical prongs.

Second, congressional intent must be considered when courts interpret legislation,[94] but the legislative history of Chapter 12 does not mandate a specific cram-down interest rate for family farmer bankruptcy proceedings. Because Congress was silent on this issue, a logical extrapolation of congressional intent is appropriate. Congress favors interpretations that allow uniform applications.[95] Therefore, when choosing an appropriate interest rate, the legislative history and judicial interpretations of the other reorganization chapters may provide guidance. This guidance, however, must be tempered

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to the payout period, with due consideration of the quality of the security and the risk of subsequent default.

90. Namely, there is no consensual loan that is directly equivalent to the coerced and distressed loan being imposed on the creditor by the bankruptcy court.

91. *See, e.g.*, Colletti v. Union County Bd. of Chosen Freeholders, 217 N.J. Super. 31, 524 A.2d 1270 (1987). In construing any statute, a court must give effect to legislative intent. Sources of intent are: language of the statute, policy behind the statute, concepts of reasonableness, and legislative history. Though it is not a bankruptcy case, the *Coletti* court does state some general methods for discussing and interpreting statutes. *See also* Ford Motor Co. v. Lyons, 137 Wis. 2d 397, 405 N.W.2d 354 (Ct. App. 1987).

92. *Colleti*, 217 N.J. Super. 31, 524 A.2d 1270 (1987).

93. See *supra* notes 33-35 and accompanying text.

94. *See* United States v. Lee (*In re* Lee), 71 Bankr. 833 (Bankr. N.D. Ga. 1987) (court's first duty in construing a statute is to give effect to the intent of Congress).

95. *See* Kampen v. Department of Transp., 150 Ill. App. 3d 578, 502 N.E.2d 31 (1986) (statute must be construed in a way that favors uniform application).

by the specific purpose of Chapter 12, which is to provide aid through leniency to family farm debtors.

Third, the general policy behind the legislation reflects a congressional intent to adopt more lenient provisions to aid the farm debtor. By passage of Chapter 12, the plight of the farmer has finally been recognized as a crisis of serious proportions.[96] Legislators acknowledged that the economic causes of the agricultural crisis lie beyond the realm of bankruptcy, and a simple addition to the Code is not a cure-all for the family farmers' troubles.[97] Nevertheless, in support of Chapter 12, the legislative history mentions such factors as the disruption of lives and the despair of being a middle-aged farmer suddenly forced to find another livelihood.[98]

Finally, the concept of "reasonableness" is indicated in the legislative history. The history states that courts should strive to preserve the equity balance between the rights of both debtors and creditors.[99] Forcing the creditors to shoulder the entire burden of presently delinquent farm loans will prove detrimental to farmers in the future in the form of a general shrinkage of credit to the argicultural borrower. Lenders operate on the profits produced by interest rates. Artificially lowering these rates and displacing their traditional remedies may prompt them to cut off what little credit is presently available to farmers.[100] Efforts to preserve a semblance of equity between the debtors and the creditors are evident by the number of creditor-supported provisions included in the Act.[101]

Using the four-pronged analysis allows for a uniform interpretation in construing the cram-down provision of the Act. This facilitates fair, equitable, and most important, consistent decisions regarding the cram-down discount rate. In this light, the cost of funds approach is best suited to Chapter 12 because of its potential to provide a flexible yet uniform means of computing present value.

Cost of Funds: A Fair and Reasonable Approach to Value

Although the explicit language of the statute is vague, most authorities agree that a creditor is entitled to compensation in addition to the amount of its allowed claim when payments are deferred.[102] The critical issue centers on the appropriate rate of interest to be used in computing that compensation.

Of the various interest rates previously discussed, the best method for deter-

96. 132 CONG. REC. S15075-S15076 (daily ed. Oct. 3, 1986) (statement of Sen. Grassley). That farmers compose a large portion of rural legislators' constituencies was one of the driving forces behind the establishment of the Act. The policy behind the Act demands that relief be granted to the troubled family farmer, thought by many to be rural America's backbone.

97. 132 CONG. REC. S15075 (daily ed. Oct. 3, 1986) (statement of Sen. Thurmond).

98. *Id.*

99. *Id.*

100. *Id.*

101. See *supra* notes 21-25 and accompanying text.

102. *In re* Hardzog, 74 Bankr. 701 (Bankr. W.D. Okla. 1987); *In re* Rott, 73 Bankr. 366 (Bankr. D.N.D. 1987); *In re* Citrowske, 72 Bankr. 613 (Bankr. D. Minn. 1987). *See also* 5 COLLIER ON BANKRUPTCY, *supra* note 71, ¶ 1129.03.

mining the minimum cram-down rate in Chapter 12 proceedings is the cost of funds approach. When a court confirms a reorganization plan, in order to carry the coerced loan, the creditor will borrow an amount of capital equal to the amount owed by the debtor.[103] If the creditor is paid a rate of interest less than its borrowing cost, the creditor will incur a loss under the plan.[104] On the other hand, if the creditor is paid a rate of interest greater than its borrowing cost, it will earn a profit on the delayed payments. In essence, the creditor will receive an amount that is greater than the present value of its secured claim.[105] Therefore, to be equitable to both the creditor and the debtor, the creditor should recover only the "cost" of accepting delayed payments. Only then will the amount received by the creditor equal the present value of its secured claim. The "cost" is the interest rate the creditor must pay to obtain replacement operating funds.

Because the cost of funds approach is tied to the cost of borrowing, the interest rate is not static. In fact, the discount rate will fluctuate with market conditions as does the creditor's actual borrowing rate. Thus the cost of funds rate is very responsive to fluctuations in the market. Accordingly, this may necessitate periodic readjustment of the cram-down rate as the creditor's cost of borrowing responds to changes in market conditions.

The cost of funds method satisfies all four prongs of the statutory interpretation model. First, the congressional intent is correctly emphasized in that the purpose of the cram-down provision's present value requirement is only to compensate the creditor for the delayed payment of its claim. Second, the general policy behind the Act is furthered by forcing the creditor to accept a minimum rate of interest while still compensating it for the cost of the funds utilized. Finally, the cost of funds approach is reasonable because there is no element of profit involved that would discriminate against additional creditors and further burden the farm debtor.

All of the alternative interest rate calculation methods have some flaw that would make them less optimal for Chapter 12 proceedings than the cost of funds method. The federal civil judgment rate, based on the fifty-two week treasury bill rate, satisfies almost all the criteria for an appropriate rate. However, because this rate bears no relation to the facts of a particular case, it tends to be purely arbitrary.

Two of the rates prescribed by law, namely the state statutory judgment rate and the IRC rate, do not reflect current economic conditions.[106] Their calculation entails readjustment only once or twice a year. This results in a

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103. *See, e.g.*, General Motors Accept. Corp. v. Willis (*In re* Willis), 6 Bankr. 555, 563 (Bankr. N.D. Ill. 1980) (court stated consumer finance business consists of borrowing money in public money markets at current rates and lending it to consumers at slightly higher rates). *See also In re* Johnson, 8 Bankr. 503, 506 (Bankr. S.D. Tex. 1981) (court acknowledged that delay in payment would require creditor to cover by borrowing elsewhere).

104. *Willis*, 6 Bankr. at 563. For an exhaustive discussion of the present value concept in its cram-down context, see 5 COLLIER ON BANKRUPTCY, *supra* note 71, ¶ 1129.03.

105. 5 COLLIER ON BANKRUPTCY, *supra* note 71, ¶ 1129.03.

106. See *supra* notes 52, 59 and accompanying text.

rate that is simply not responsive enough to the continual fluctuation of market conditions. Moreover, the unresponsiveness of the state judgment rate and the IRC rate is inconsistent with the policy behind the Act. Generally, a responsive rate will be more appropriate than a static rate because neither party is locked into a losing situation.

Similarly, the contract rate locks parties into a static interest rate that may be months or years old. Also, this rate includes a profit element that is clearly inappropriate in the bankruptcy setting.[107] In addition, because of the nonuniformity of its application between debtors and creditors, the contract rate does not allow the consistency necessary to conform to the legislative history. This is partly the result of the reluctance of the courts to bind debtors to a contract rate where market rates have fallen.

Due to the amount of variance present in each method, the expert witness rate and the other hybrid methods do not serve the legislative purpose of uniformity of application. In fact, these methods present problems due to the very mode of their determination. If all parties present expert witnesses to testify as to the appropriate interest rate, the process of determining a rate becomes further convoluted. This may shed light on the need and circumstances of the particular case, but it does not simplify the process. Increased time of litigation, decreased efficiency, and diversity caused by ad hoc decisions make this method less attractive. Likewise, the lack of uniformity present in the expert witness rate is also inherent in the hybrid rates established by averaging. Because of the simplicity of a singular rate like the cost of funds method and because other methods allow too much variance to be uniformly applied, they should not be used.

The current market rate for similar loans, which was adopted by the *Citrowske* court,[108] is also flawed because of its inherent profit and risk premiums. Neither of these are appropriate in a Chapter 12 proceeding. Profit has been acknowledged as generally inappropriate in bankruptcy.[109] Moreover, risk to a secured claim in the Chapter 12 context is low once a reorganization plan has been confirmed. Not only must the plan be feasible,[110] the Code specifically requires that "adequate protection" be provided for confirmation.[111] Furthermore, the creditor has access to information regarding the debtor's ability to pay debts.[112] Finally, it would be very difficult to find a truly comparable consensual loan.

107. Many courts have determined that profit should not be included in the cram-down interest rate. *See, e.g.*, *In re* Mitchell, 39 Bankr. 696 (Bankr. D. Or. 1984); *In re* Johnson, 8 Bankr. 503 (Bankr. S.D. Tex. 1981).

108. *Citrowske*, 72 Bankr. at 617. See *supra* notes 84-90 and accompanying text.

109. See *supra* note 107.

110. The Code requires feasibility as a prerequisite to confirmation under 11 U.S.C. § 1225(a)(6) (Supp. IV 1986).

111. Chapter 12 adopts and must comply with all the other provisions in the title. Adequate protection must be provided to satisfy 11 U.S.C. § 361 (1984).

112. Creditors may examine the debtor, under oath, to determine if any assets have been improperly disposed of or hidden. 11 U.S.C. § 343 (1984).

It is not reasonable to allow some creditors to profit from the court's enforcement of the current market rate while the potential exists to harm additional claims made by unsecured creditors. This could make creditors shun future agricultural lending, eventually hurting farmers and thus frustrating the policy behind the Act, which is to aid financially troubled farmers.

The cost of funds rate is the only method for calculating the cram-down interest rate that is appropriate for Chapter 12 proceedings. It not only serves the purpose of the Act, it also adequately compensates the creditor.

Conclusion

Providing creditors with the present value of secured claims is required by the Bankruptcy Code. This requirement cannot be lightly brushed aside in the courts' haste to aid family farm debtors during the present agricultural crisis. However, Chapter 12 is designed to aid the family farmer, and this purpose must be considered when choosing an appropriate cram-down interest rate.

There are two categories of cram-down interest rates that have been previously adopted, those prescribed by law and those judicially determined by discretionary methods. Of these methods, the most appropriate method for determining the cram-down rate for Chapter 12 is the cost of funds approach.

It is time that Congress or the courts set a uniform method for calculating the appropriate cram-down interest rate. Presently, the myriad of available methods causes confusion and a serious lack of uniformity. As a result, an Oklahoma debtor may pay an interest rate of more than 15 percent while a Texas debtor may pay only 6 percent. The cost of funds approach would serve the purpose of uniformity and at the same time compensate the creditor.

However, a uniform rate will certainly never become a reality unless Congress acts to create one. Such an act of Congress would not only reduce litigation, it would also instill a predictability in the bankruptcy process that heretofore has not existed.

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